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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

PARIS ADULT THEATRE, I,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE, II,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioners, Paris Adult Theatre I and Paris Adult Theatre II, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Georgia, entered in the entitled case on October 30, 1973.

OPINIONS BELOW

This case was the subject of review by the U. S. Supreme Court Docket No. 71-1051. The case was argued on October 19, 1972 and decided June 21, 1973. It is now reported at 413 U.S. 49. This Court vacated the judgment of the Georgia Supreme Court (decided on November 5, 1971) and remanded the case to the Georgia Supreme Court "for further proceedings not inconsistent with this opinion and *Miller v. California,* Supra (413 U.S. 15). See *United States v. 12 200 Ft. Reels of Film,* post at 130, N. 7." (413 U.S. 123).

Upon remand the Georgia Supreme Court again ruled adversely to Petitioners and reversed the trial court sitting without a jury. (See Trial Court Order which appears in Appendix A.) The decision of the Supreme Court of Georgia on remand was entered on October 30, 1973 and appears in Appendix B hereto.

JURISDICTION

The Supreme Court of Georgia rendered its decision on remand of 71-1051, on October 30, 1973. The Petition for a Writ of Certiorari is filed within Ninety (90) days of that date. Jurisdiction is invoked under *28 U.S.C. Sec. 1257(3).*

QUESTIONS PRESENTED

1. Were the Judgments and Opinions of this Court in the five (5) so-called obscenity pornography cases entered on June 21, 1973, and on which the Supreme Court of the State of Georgia relied in its decision on remand (October 30, 1973), constitutionally invalid and repugnant to Petitioners' rights

under the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution* insofar as those five (5) cases were applied to said Petitioners in the adverse Judgment rendered by the Georgia Supreme Court?

2. Are the provisions of *Georgia Code 26-2101* as written and applied to Petitioners herein, repugnant to the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution* and in particular the constitutionally permissive strict standards laid down by this Court in *Miller v. California*, 413 U.S. 15?

3. Are the two motion picture films involved herein obscene in the constitutional sense and thus are not protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*, as the same was applicable during the period of time covered by the conduct charged against Petitioners?

4. Can the various United States Supreme Court rulings on obscenity promulgated on June 21 and June 25, 1973, effecting a substantial decisional changed in the application of constitutional principles, be applied retroactively to Petitioners in the case at bar for conduct occurring prior to those decisions, and, is the application of the statute to said petitioners void as Ex Post Facto legislation, by virtue of *Article I, Sections 9* and *10* of the *United States Constitution* and the Due Process clause of the *Fifth* and *Fourteenth Amendments?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the provisions of Georgia Code § 26-2101 are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

Petitioners Paris Adult Theatre I and Paris Adult Theatre II comprise an "Adults Only" theatre at 320 Peachtree Street, N.E., Atlanta, Georgia. Entrance to each of the two theatres is gained through a common lobby. On December 28, 1970, the movie, "It All Comes Out In The End" was showing in one theatre and the movie, "Magic Mirror" was showing in the other. Investigators of the Criminal Court of Fulton County viewed each of the films on the above date. Subsequently, on the same day, two separate complaints (one for each film and theatre) were filed in equity, asking that the films be declared obscene and that their further exhibition be temporarily and permanently enjoined after a hearing on the issue of obscenity. Various personnel of the theatres, none of whom are appellants herein, were served with the complaints and the order of the Superior Court of Fulton County temporarily restraining and enjoining the defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of the Court. Defendants were further ordered to have one print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same.

On the 13th day of January, 1971, the films were produced by attorneys for the theatres, after one of the defendants served had been held in contempt for refusing to furnish the films on the ground that to do so might incriminate him.

The hearing was stipulated by the parties to be a final one. At said hearing on the issue of the obscenity of the films, no evidence was introduced by Respondents as to their obscenity, except the films themselves. There was no evidence that the films, when considered as a whole, predominantly appealed to a prurient interest in nudity, sex or excretion. There was no evidence that said films were patently offensive because they went substantially beyond the customary limits of candor in the depiction of sex or nudity, applying contemporary community standards. There was no evidence by the Respondent of any kind as to what constituted the contemporary community standards of any community, local, state, or national.

On the other hand, Petitioners produced testimony that the predominant appeal of the films was not to a prurient interest in sex and that the films were of value to society, and did not go substantially beyond the customary limits of candor in the representation of sex or nudity.

Evidence revealed that the theatres were for "Adults Only" and that the films were not advertised, except as to their name. There was no evidence that minors had ever entered the theatres or seen the films.

At the conclusion of the introduction of all evidence, the Trial Court took under advisement the Motion to Dismiss

filed by Councel for Petitioners which raised, *inter alia*, the contentions that the Georgia Criminal Obscenity Statute was both void for impossible overbreath and/or void for vagueness, as well as the concept that the subject motion picture films were not factually obscene in the Constitutional sense as a matter of law under the Roth-Memoirs-Redrup standards thought applicable at that time.

The Trial Court denied the Motion insofar as it sought to have the Georgia Criminal Obscenity Statute (Georgia Code § 26-2101) declared unconstitutional. The Trial Court held in essence that this was a close or borderline case, and in the absolute absence of any evidence that Petitioners' or their representatives had thrust the exhibition of the subject motion picture films by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive or view such material and further in the absolute absence of evidence showing any signficant danger of the subject motion picture films being exposed to juveniles, and in the absence of any evidence of Ginsburg-type pandering, the Trial Court held the subject films to be protected by the First and Fourteenth Amendments to the Constitution. These were the elements that the majority of the Supreme Court held could be determinative in a close case. *Redrup v. New York*, 386 U.S. 767 (1967)

We suggest that in the June 21, 1973 decision by this Court in the *Paris Adult Theatre*, this Court incorrectly interpreted the rationale of the trial judge in ruling as he did. (See 413 U.S. at 57.)

HOW FEDERAL QUESTIONS ARE PRESENTED

The District Attorney for the Atlanta Judicial Circuit and the Solicitor of the Criminal Court of Fulton County together filed complaints in the Superior Court of Fulton County against Petitoners and named individuals to have the films "Magic Mirror" and "It All Comes Out In The End" declared obscene. The complaint, as to each film, alleged that "the sole and dominant theme of the said motion picture film, considered as a whole and applying contemporary community standards, appeals "to the prurient interest in sex, nudity and excretion, and that the said motion picture film is utterly and absolutely without any redeeming social value whatsoever, and transgresses beyond the customary limits of candor in describing and discussing sexual matters."

The Complaints further alleged that the films were being shown in their respective theatres, to the public, on a fee basis.

The Complaints prayed that the films be declared obscene and subject to seizure; that the Defendants be temporarily and permanently enjoined from exhibiting the named films within the jurisdiction of the Court; that Defendants be temporarily restrained and enjoined from destroying, altering, concealing or removing the respective films ' without the jurisdiction of the Court; that a Rule Nisi issue requiring the Defendants to show cause on a date certain why the named films should not be declared obscene and seized by plaintiffs, and that Defendants be directed to have and produce upon the said hearing date the named motion picture films.

An order issued in each case compelling Defendants to show cause, on a date ten days subsequent to the date of service, why the prayers of the Plaintiffs should not be granted and the named motion picture films declared obscene. Defendants were also ordered to produce the films and were temporarily restrained and enjoined from concealing, destroying, altering, or removing the named motion picture films without the jurisdiction of the Court. On the date of the hearing, the Defendants appeared befory the Court and filed a Consolidated Motion to Dismiss, on the grounds, *inter alia*, that the films are not obscene in the constitutional sense and are protected expression under the *First Amendment* to the *United States Constitution* made obligatory upon the states by the *Fourteenth Amendment* and that the *Georgia Code, Sec. 26-2101*, is void for vagueness and impermissible overbreath insofar as it attempts to establish constitutional standards by which press materials can be judicially measured to determined whether they are obscene and as such is violative of the Petitioners' rights under the *First, Fifth, Sixth* and *Fourteenth Amendment* to the *Constitution of the United States.*

The Motions to Dismiss were argued to the Trial Court which overruled them. At this point, the individual Defendants, having invoked *Fifth Amendment* privileges against self-incrimination and the Court finding one individual Defendant in contempt for not producing the films, on the ground that he had no right to assert the privilege, but suspending his $100 fine, counsel for Petitionters, as an officer of the Court, made the films available to the Court. At the conclusion of the viewing and of the evidence, Petitioners renewed their Motions to Dismiss and the Court, after taking the matter under advisement, found both films to be

constitutionally protected expression when, as here, shown in a commercial theatre and surrounded by requisite notice to the public of their nature and be reasonable protection against their exposure to minors. The Motions to dismiss were granted.

The Plaintiffs below appealed directly to the Supreme Court of Georgia. The grounds of enumerated error were that the Court erred in declaring each of the films to be not obscene, in refusing to enjoin the Defendants from exhibiting each of said motion pictures, and in granting the Motion to Dismiss filed by the Petitioners.

The Georgia Supreme Court reversed the judgment of the trial court and the Petitioners herein filed a *Petition for a Writ of Certiorari* in the U.S. Supreme Court where it was docketed as No. 71-1051. Certiorari was granted on June 26, 1972 and the case was argued on October 17, 1972. Among the questions presented by the original petition, presented in Docket No. 71-1051, was whether the material was obscene in the constitutional sense, as well as reference to the constitutional relevant elements of the standards for judging proscribable obscenity under the First Amendment.

The Court decided the case on June 21, 1973, reported at 413 U.S. 49, and vacated the judgment of the Georgia Supreme Court and remanded it for consideration in light of the other so-called obscenity cases decided the same day. (i.e. *Miller, et al.*)

At the conclusion of its ruling, 413 U.S. at page 69, the Court stated in essence that "nothing precludes the State of Georgia from the regulation of the allegedly obscene material

exhibited in Paris Adult Theatre I or II, *provided that the applicable Georgia law, as written or authoritatively interpreted,* by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California, ante* at 23-25." (Emphasis supplied.)

When the case was remanded to the Georgia Supreme Court an order was passed directing all counsel to file memorandums of the effect of the remand. The issues as raised by various counsel in the Georgia Supreme Court were as follows:

A. Counsel for Paris Adult Theatres:

1. The vacation of the Judgment in this case and the remand to the Georgia Supreme Court for "further proceedings" leaves unconstitutionally vague what the duty is that is imposed upon the Appellate Court with regard to "further proceedings."

2. The U.S. Supreme Court decisions on June 21 and 25, 1973 regarding obscenity, mandates the conclusion that Georgia's Obscenity Statute [Ga. Code Sec. 26.2101, Sec. (b)] is void for vagueness in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution.

3. The Georgia Obscenity Statute cannot be applied retroactively because to do so would violate Defendant-Appellees' constitutional rights under due process and would be *ex post facto* in nature.

4. The Supreme Court of the State of Georgia should not incorporate the "Miller" definition of obscenity statute because to do so would be legislation by judicial decree.

5. The pressmaterials charged as obscene were First Amendment protected expression under the thirty-one-plus cases decided by the U.S. Supreme Court following *Redrup v. People of the State of New York*, 386 U.S. 767 (1967).

B. Counsel for Appellants Lewis R. Slaton and Hinson McAuliffe:

1. The patently offensive standard set forth in Section (b) of the kinds of conduct suggested by Chief Justice Burger is not inconsistent in effect and application with Georgia Code Section 26.2101 (customary limits of candor).

2. The Georgia Supreme Court has defined and described the conduct which offends the Georgia statute in almost the same language suggested by the Supreme Court of the United States in *Miller:* i.e. "Sexual intercourse, natural, unnatural, bizarre and violent, real or simulated; *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 379; 180 S.E.2d 712: Sexual intercourse, fellatio and cunnilingus, *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464: Sexual intercourse, cunnilingus and masturbation, *1024 Peachtree Corporation v. Slaton*, 228 Ga. 102, 104, 184 S.E.2d 145.

3. The movie films are obscene.

C. Counsel for the Attorney General for the State of Georgia, on behalf of the people of the State of Georgia:

1. The injunction should issue because applicable state law, as construed, specifically defines the conduct involved in this appeal.

2. The regulation of obscenity is not limited to protection of juveniles and unconsenting adults.

3. The civil remedies sought in this case would not subject Appellees to *ex post facto* liability or to a law which is vague or overly broad.

The issues as presented on remand to the Georgia Supreme Court thus became the issues of law considered by the Court and it's ruling was directed in fact to those issues.

On October 30, 1973, the Supreme Court of Georgia without allowing oral argument decided again the case of *Slaton v. Paris Adult Theatre, et al,* (Appendix B) and again reversed the judgment of the Trial Court and in essence ruled as follows:

I. Overbreath – The Court held that the Georgia Statute was not void for impermissible overbreath and in support of it's concept of the Statute as written, or as authoritatively construed, with regard to Petitioners herein, stated in part as follows: "In the past, this Court has defined and described conduct as obscene within the meaning of the Georgia Statute in substantially the same language as that suggest by the Supreme Court in *Miller* .... these decisions are, in effect, interpretations of that portion of the Georgia Statutory definition providing that material 'is obscene if ... its predominant appeal is to a prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion ...' these cases specifically 'limit' the phrase they interpret and a fair reading of them leads to the conclusion that the Georgia Statute was designed to reach only 'hard-core pornography,' outside of the First Amendment protection."

The Court went on to say "we, therefore, conclude that the Georgia Statute has been specifically delineated in a manner consistent with the new *Miller* standards. In rejecting counsel's constitutional challenge to the statute we therefore reaffirm our prior ruling that it is not overly broad or vague in definition."

II. Due Process – The Court said that the Appellees' contention that the Georgia Statute as construed cannot be applied retroactively save in violation of due process of law was erroneous because in the opinion of the Georgia Supreme Court the Georgia statutory definition has been previously authoritatively construed by the Court to include those standards for obscenity as now permitted by *Miller*. The Court went on to say, "thus, the *Memoirs* test, as construed to include standards offering greater protections to free speech and expression than those in *Miller*, is fully applicable to the pre-Miller Defendant."

The Court went on to say, "In summary, this Court has previously construed the statutory definition of obscenity in a manner authorized by the new *Miller* guidelines and therefore has not judicially enlarged Georgia Code Ann. 26-2101 (b) ... there has been no unconstitutional, subsequent, contraction of an overly broad statute to save its application retroactively."

III. Standards – The Supreme Court of Georgia has held that under *Miller v. California* the community by which obscenity standards are to be gauged is that of the State of Georgia.

It further held that expert testimony was no longer necessary where the materials themselves were available for inspection.

The Supreme Court of Georgia further held that the consenting adult theory was no longer entitled to any validity.

Whereupon the Court then made a judicial construction which they claimed was inherent in their prior judicial decision. That the definition of what is obscene or the standards to be applied under *Georgia Code Annotated 26-2101 (b)* were as follows: "Applying contemporary community standards and considering the material or film as a whole, the average person would find (a) Its predominant appeal is to prurient interest in sex; (b) the material or film is a patently offensive depiction or description of sexual conduct, emboding a shameful or morbid interest in nudity, sex or excretion and going substantially beyond customary limits of candor in describing or representing such matters; (c) the material or film taken as a whole lacks serious literary, artistic, political or scientific value; and, (d) the material or film taken as a whole is utterly without redeeming social value."

It is thus to the decision of the Supreme Court of Georgia that we address the questions in this our *Petition for Writ of Certiorari.*

REASONS FOR GRANTING WRIT

I.

THE JUDGMENTS AND OPINIONS OF THIS COURT IN THE FIVE (5) SO CALLED OBSCENITY PORNOGRAPHY CASES ENTERED ON JUNE 21, 1973, AND ON WHICH THE SUPREME COURT OF THE STATE OF GEORGIA RELIED IN ITS DECISION ON REMAND (OCTOBER 30, 1973), WERE CONSTITUTIONALLY INVALID AND REPUGNANT TO PETITIONTERS' RIGHTS UNDER THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION INSOFAR AS THOSE FIVE (5) CASES WERE APPLIED TO SAID PETITIONERS IN THE ADVERSE JUDGMENT RENDERED BY THE GEORGIA SUPREME COURT.

Introduction and Summary

The five obscenity cases decided by the Court on June 21, 1973[1] depend for their correctness upon the validity of each of a series of five legal or factual propositions:

(1) That "obscenity," as defined in *Miller v. California*, 41 U.S.L.W. 4925, is "unprotected" by the First Amendment;

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[1] *Miller v. California*, 413 U.S. 15; *Paris Adult Theatre v. Slayton*, 413 U.S. 49; *United States v. Orito*, 413 U.S. 142; *Kaplan v. California*, 413 U.S. 115; *United States v. 12 200 Ft. Reels*, 413 U.S. 123.

(2) That the right of privacy to read "obscene" sexual materials of one'e own choice, recognized in *Stanley v. Georgia*, 394 U.S. 557, is applicable only within "a place, the home";

(3) That there are "legitimate State interests" supporting prohibitions upon consensual distributions of sexual material between adults;

(4) That the constitutional definition of "obscene" adopted in *Miller v. California* provides "fair notice" and "concrete guidelines" regarding what is and what is not "obscene";

(5) That the same constitutional definition of "obscene" is applicable to prohibitions upon consensual distributions of sexual materials to adults as is applicable to prohibitions upon the "thrusting" of such materials upon unwilling recipients.

Each of these propositions is demonstrably false in fact, logic, or precedent. Since the correctness of the June 21 decisions rests upon the validity of *all* these propositions, rehearing would be required if any one of them were plainly false. Rehearing is essential when every link in the Court's chain of reasoning is demonstrably defective.

In addition, the Court's June 21 decisions flow from two separate procedural errors which infect the entire decisional process:

(1) One element of the constitutional definition of "obscene" applied in all of the cases – that the material in question lack "serious literary, artistic, polical or scientific value" – was adopted by the

Court *sua sponte* without argument or prior notice to the parties or *amici;*

(2) The Court totally ignores the findings of the Commission on Obscenity and Pornography, a research and advisory body established and funded by the Congress of the United States, with membership appointed by the President. The findings of this body are completely inconsistent with the Court's holdings.

The brief which follows separately discusses each of the Court's fundamental mistakes of judgment or process. The picture which emerges is one of colossally erroneous constitutional adjudication.

I. This Court has adopted a new "serious ... value" test for obscenity without prior notice or argument. Such a course of action would, if permitted to stand, violate the most fundamental principles of fairness as well as deprive the Court of useful argument on a controversial constitutional innovation.

Prior to the Court's decision in *Miller v. California,* no work was held obscene by this Court unless it was "utterly without redeeming social value." This was the view of a plurality of the membership of the Court. When joined by the view of other members of the Court that expression is always protected from obscenity laws, it constituted the operative constitutional standard. A majority of the Court in the *Miller* opinion, however, alters this standard so that it is now necessary to show, not that the work is "utterly without redeeming value" but that "taken as a whole," it lacks "serious literary, artistic, political or scientific value." (413 U.S. 23-24) The Court appears to assume that this definitional

change is one of substance, for immediately after laying down the "serious ... value" criterion, the Court notes: "We do not adopt as a constitutional standard the *'utterly* without redeeming social value test' .... (Ibid.) The definitional change is also repeated, at the end of the *Miller* opinion, in the Court's summation of its holding in that case. (41 U.S.L.W. at 4931.)

That the existence of "serious ... value," rather than an "utter" lack of "redeeming social value" should be one of the three constitutional tests for obscenity was, so far as Petitioners are aware, not argued to the Court by any of the parties to the cases decided on June 21, 1973. Nor was this definitional change proposed by the Court itself to the parties as one to which they should give their attention in argument. These omissions are especially significant since, as the Court is aware, one definitional matter – "national" vs. "statewide" community standards – was argued extensively, and another question – the constitutionality of regulations applicable to "consenting," adults – was explicitly raised by the Court for the parties' attention when some of the cases were set down for reargument.

The issue at this juncture is not whether the "serious ... value" criterion is wide or workable. We argue in the next section of this brief that the "serious ... value" test is, at the least, exquisitely vague and that it raises the constitutionally intolerable spectre of providing First Amendment protection only for ideas and information desired by intellectually and aesthetically elite groups within our population. The issue is whether a major alteration in the constitutional test for obscenity – be it a good or bad alteration – should have been made by the Court *sua*

sponte, without notice or argument of any kind, and without the opportunity for full and perceptive consideration of the issues which adversary argument uniquely affords. We hope that, upon reconsideration, the Court will agree that such a change should not have been adopted, or until Petitioners' herein are given an opportunity to brief and argue the merits of the "serious ... value" test and the Court has had an opportunity to consider those arguments. The opportunity to address a question of law before it is decided is perhaps the most fundamental guarantee of fairness and legal accuracy which our adversary system offers. It would be distressing, to say the least, to see the Court deny it, the more so when the issue is the scope of the constitutional right of free expression.

II. Despite the Court's assertions to the contrary, the revised test for obscenity announced in *Miller v. California* demonstrably does not provide either "fair notice" or "concrete guidelines" regarding what may constitutionally be deemed "obscene." Since the Court's decisions in *Miller* and *Paris Adult Theatre v. Slayton* are explicitly premised on the *Miller* opinion's ability, for the first time, to bring adequate clarity into obscenity law, rehearing is required to consider whether – and how – adequate clarity can be obtained.

In its opinion in *Miller v. California*, the Court formally recognizes what everyone connected with obscenity law had known for years – that under the original formulation of *Roth v. United States*, 354 U.S. 476, the "three-part" plurality approach of *Memoirs v. Massachusetts*, 383 U.S. 413, and the "casual practice" of *Redrup v. New York*, 386 U.S. 767, it had been impossible to know with any adequate

degree of certainty whether material dealing with sex would be constitutionally treatable or "obscene" or whether it would be held to be expression protected by the First Amendment. The Court in *Miller* correctly concludes that a continuation of this condition of extreme vagueness in the line of demarcation between protected and unprotected speech on sexual subjects is constitutionally intolerable because of the lack of "fair notice" to producers of and dealers in sexually related material and the absence of "concrete guidelines" for prosecutors and state and lower federal courts. (413 U.S. 24)[2]

The explicit premise of the revised three-part test which the Court adopts in *Miller v. California* is that this new test – unlike *Roth*, or *Redrup* – will bring adequate clarity into

[2] In this respect, the *Miller* opinion is in full agreement with the national Commission on Obscenity and Pornography which, in its 1970 Report to Congress and the President (p. 40) found that under existing law:

> It is impossible for a publisher, distributor, retailer or exhibitor to know in advance whether he will be charged for a criminal offense for distributing a particular work, since his understanding of the three [*Roth-Memoirs*] tests and their application to his work may differ from that of the police, prosecutor, court or jury. This uncertainty and consequent fear of prosectuion may strongly influence persons not to distribute new works which are entitled to constitutional protection and thus have a damaging effect on free speech. These definitional problems are also cited by law enforcement officials on all levels as their chief difficulty in enforcing existing obscenity laws. There is, therefore, almost universal dissatisfaction with present law.

The Report of the Commission on Obscenity and Pornography is referred to at several places in this brief. A discussion of the Court's remarkable failure to allude to this Report in its *Miller* and *Paris Theatre* opinions is contained in Point VII of Argument I of this Petition.

obscenity law. This premise is, however, demonstrably wrong.

The Court appears to believe that adequate clarity will flow from the fact that the *Miller* test requires, for the first time, that obscenity laws be restricted to "works which depict or describe sexual conduct," which conduct is "specifically defined by the applicable state law". (413 U.S. at 24) But all works which depict or describe previously defined sexual conduct are obviously *not* obscene under *Miller* any more than under prior constitutional tests. The consequences of obscenity can constitutionally be visited on works only when, in addition to their treatment of defined "sexual conduct", they also appeal to the "prurient interest" in sex of the "average person", are "patently offensive" and lack "serious ... value." For the test of obscenity to be adequately clear it must be clear, therefore, not only which sexual depictions are initially covered by the law, but also which such depictions will additionally be found to be prurient, offensive, and lacking in requisite value. As we show immediately below, however, these requirements of the constitutional standard remain as intolerably vague under *Miller* as under all earlier formulations.

(1) *Appeal to the "prurient interest" of the "average person".* – The *Miller* opinion emphasizes repeatedly that only material appealing to a "prurient" interest in sex can be constitutionally regarded as obscene. This, indeed, is the basic definition of what is obscene originally adopted in *Roth*. (354 U.S. at 487). Yet the Court has never provided even the most rudimentary degree of guidance regarding what is a *prurient* sexual interest, as compared with other sexual interests which may be appealed to with full constitutional protection. The Court has attempted to define "prurient" on only one

occasion – the 1954 *Roth* opinion – and its treatment could hardly have been more confusing. In that case the Court said that material appeals to prurient interest if it has "a tendency to excite lustful thoughts." (354 U.S. at 487 n. 20) The Court also said (quoting from *Webster's* dictionary) that prurient was equivalent to "itching; longing; uneasy with desire or longing." (*Ibid.*) Finally, the Court referred with approval to the Model Penal Code definition of prurient interest as "a shameful or morbid interest in nudity, sex, or excretion." (*Ibid.*)

Now "lust" is simply not the same as "uneasy desire" or "longing," and surely none of these feelings is automoatically equivalent to "shame" or "morbidity". For example, a film which would cause a married person to feel sexual longing or desire – even lust – for his or her spouse would certainly not also cause feelings of shame or morbidity if the marriage relationship was even remotely normal. Must a producer or distributor of books or films on sexual subjects thus take care that his works not arouse lust in his readers or viewers, that they not cause uneasiness or longing, that they not cause shame or morbidity, that they not cause *all* of them at once, or what? The Court's opinion in *Miller* repeats and relies upon the term "prurient" numerous times, but it makes no attempt to describe which of these widely differing reactions it means to refer to. If there is to be "fair notice" and if there are to be "concrete guidelines" on the basic concept of pruriency, the Court is sure obligated to offer further – and more lucid – explanation of the meaning of prurient.

The lack of meaning and clarity in the concept of pruriency is, moreover, quite small in comparison to the utter impossibility of divining – as one must under *Roth-Miller*

– what will arouse the prurient interest (whatever that means) of the *average person.* If the *Miller* formulation is to offer adequate, definitional clarity, one would have to assume that there is some widely shared (and therefore generally known) "average" societal reaction to certain types of sexual materials. This assumption may once have been accurate. At a time when all materials with highly, explicity, sexual contents were either distributed "under-the-counter", or to extremely restricted and specialized audiences such as doctors and sex researchers, it may well have been true that a very broad spectrum of American shared a common and predictable reaction to such materials, and that this reaction was a "prurient" one (assuming that term to have a single and clear, rather than a multifaceted and contradictory meaning).

But it is common knowledge today that the most explicit sexual depictions in films and books sometimes draw a wide audience – often indeed, making the "best seller" lists – and that these audiences do not often exhibit signs of morbidity, shame, lust or sexual itching. At the same time, such materials have no appeal whatsoever for many other persons, while for still another group they are repulsive. Thus, the National Commission on Obscenity and Pornography, found, as the result of numerous studies into the evaluation by Americans of extremely explicit sexual materials, that there was "very little consensus among people regarding either the 'arousingness' or the 'offensiveness' of a given sexual depiction. A wide distribution of judgments ... occurs, for example, for explicit depiction of female nudity with genitals exposed, for explicit depiction of heterosexual intercourse, and for graphic depiction of oral-genital intercourse. In

addition, judgments differ among different groups: Males as a group differ from females . . . ; the young differ from the old; the college-educated differ from those with only a high school education; frequent church attenders differ from less frequent church attenders." (Commission Report, p. 41).[3] Put another way, "what may not be provocative to one person may well be to another." (*Rowan v. Post Office Dept.*, 397 U.S. 728, 737 [opinion for the Court by Chief Justice Burger]).

Which then among these wholly different and widely shared present-day judgments about and reactions to the most extremely explicit sexual materials is the reaction of the "average person"? The fact is, of course, that there no longer is any consensus or "average" reaction to explicit sexual materials, any more than it is possible to say whether the "average" American likes olives or ice hockey. Vastly differing tastes and reactions cannot be "averaged" like height and weight or family income.

The *Miller* opinion indeed recognizes that, taking the nation as a whole, "average" standards of taste and reaction regarding sexual materials are, as we have just shown, "hypothetical and unascertainable". (413 U.S. at 31). This fatal vice of vagueness is not cured, however, as the Court appears to suppose, by authorizing the application of state-wide, rather than national, standards. A state such as California, where the *Miller* case arose, contains fully as broad

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[3] Petitioners are not aware of any contrary evidence or conclusions about the widely varying responses among Americans to explicit sexual depictions, either in the several dissents from the Commission Report, or elsewhere.

a spectrum of age, occupation, educational background, religious beliefs and non-beliefs – and reactions to explicit sex – as the nation as a whole. The *Miller* opinion correctly notes that "People in different States vary in their tastes and attitudes" (413 U.S. at 33), but tastes do not suddenly become uniform when one crosses a state border. People in the *same* state also vary in their tastes and attitudes. The reactions of the "average" Georgian to a sexual depiction are thus as "hypothetical and unascertainable" as the reactions of the "average" American. A test for obscenity which requires a prediction as to whether the nonexistent sexually "average" Georgian will have a "prurient" reaction to a given sexual depiction provides neither "fair notice" nor "concrete guidelines".

(2) *"Patently offensive, in light of contemporary community standards".* – Under the formulation offered by the Court in *Miller*, descriptions or depictions of sexual conduct, which appeal to the "average" "prurient interest", are nonetheless constitutionally protected unless they are, in addition, "patently offensive" in light of "community standards." We can assume that, if a publisher or distributor of books or films dealing with sexual conduct were to interview any individual about his reaction to a particular publication, it would be possible to tell whether that individual found the work, upon examination, to be "patently" offensive to himself. But how is a publisher or film distributor to tell whether his work will be patently offensive to a "community"?

In the first place, the Court has never defined what it means to say that a "community" finds a work offensive. The Court seemingly cannot mean to limit the concept to

situations where *every* member of the community is offended for, if so, the law of obscenity, as applied in *Paris v. Slayton, supra* to consensual distributions of materials would have effect only where it was wholly unnecessary (for surely "patent" offensiveness refers to such a high degree of dislike that only an abnormal individual would willingly purchase that which patently offends him). Does a "community" then find a work offensive within the meaning of *Roth-Miller* when a bare majority are repelled by it, when a substantial majority are repelled (say seventy or eighty percent) or only when there is an overwhelming consensus of repulsion (say ninety five to ninety nine percent)?

And even if an answer were given to these questions (the Court, however, has never offered one), the overwhelming problem of vagueness would still like in the necessity of determining, in advance, whether the requisite percentage of a given community will, in fact, be offended by a particular work, when the particular tastes and sensitivities of the members of that community cannot possibly be known to a publisher or distributor before he exposes himself to criminal liability. As noted above, in the discussion of the meaning of the "prurient" interest of the "average" person, all of the research carried out to date shows that, contrary to what the Court may have assumed, Americans are entirely unpredictable with regard to whether they find even the most "hard core" sexual depictions offensive or attractive and a substantial number do not take offense at any category of hard-core depictions. In addition, an extensive national survey of American public opinion undertaken by the Obscenity Commission showed that in 1970 approximately half of us believed that it was "all right" to have any and so called all hard core pornography available to adults who wish to read or

view such materials privately. (Commission Report, pp. 352-353) The materials to which this survey referred included pictures mainly for the purpose of showing sex organs, pictures of men and women having sexual intercourse, pictures of mouth-sex organ contact between men and women, pictures of homesexual activities, and even pictures of sex activities which include whips, belts, or spankings. Where in this blanket approval by a majority of the consensual distribution of the most explicit materials is a producer or distributor to find guidance about what particular book or film will actually offend the requisite percentage (whatever it is) of the community? In view of this data, it is difficult indeed to understand the Court's confidence that there is now "fair notice" regarding the line between the obscene and the constitutionally protected, so long as obscenity is made to turn on the "community's" sense of offense.

(3) *"Lacks serious literary, artistic, polical or scientific value."* – In footnote 7 of the *Miller* opinion, the Court explicitly "reject[s], as a constitutional standard, the ambiguous concept of 'social importance'." The Court adopts instead the concept of "serious ... value". What the Court does not explain – and what is, in fact, inexplicable – is why the concept of "serious ... value" is any *less* ambiguous as an independent test of obscenity than the rejected test of "social importance."

While the *Miller* opinion does not define the meaning of "serious" in its test, we may safely assume that "serious" is not intended as denoting the opposite of "humorous." (It is inconceivable that the Court means to disqualify a sexual comedy from constitutional protection, while affording constitutional protection to a tragedy with identical sexual content and literary or artistic merit). "Serious" value then,

must be the equivalent of "substantial" value. How is it any less "ambiguous" to require that a work be "substantial" in a literary, artistic, political or scientific sense, than to require that it be "important" socially? The two phrases would, indeed, appear to mean precisely the same thing.

The ambiguity in determining either the "substantiality" or "importance" of a contribution to literature, art, politics or knowledge is caused by the fact that there can never be expected to be any agreement among a broad segment of the population about what is substantial or important. A book which has substance for one person may have no utility for another, and *vice versa*. This is true with regard to sexual subjects, as well as any other subjects. A film detailing various positons of sexual intercourse may have no importance to a gynecologist, a pre-adolescent or a married person with extensive sexual experience, but it may be extremely valuable to a recently married young adult couple who are having difficulty making a satisfactory sexual adjustment. A sexual fantasy such as the masochistic "Story of O" may impress – as it did – the book reviewer for the New York Times as a work of great psychological importance, while it communicates little or nothing to a high school drop-out. A different sexual yarn may be trash to the New York Times and interesting literature to a blue-collar worker. If "serious ... value" requires that everyone see something of substance in a work then nothing has serious value. Nor, in a democratic society, can serious value be limited to what appeals to professional critics, college professors and the like. Joyce's "Ulysses" has serious literary value (we suppose the Court would agree) despite its explicit – and to many people offensive – sexual content, because a small minority of well-educated people read it and like it for its literary value to

them. By the same token, a book about sexual conduct, thoughts and adventures which a traveling salesman reads and likes for its literary value to him must also have serious value. The First Amendment is designed for the interests and tastes of everyone – not just those who operate on the frontiers of knowledge or who constitute the literary or artistic *avant garde.*

As in the areas of pruriency and offensiveness, the Court may thus have assumed in formulating its *Miller* opinion, that there is an ascertainable body of sexually oriented descriptions and depictions which are insubstantial aesthetic or educational works for virtually every American and, hence, without "serious ... value". If so, the Court was wrong. In one study done for the Commission on Obscenity, for example, couples married for 15 to 19 years viewed "hard core" pornographic films once a week for four weeks. More than 40% of the subjects of the study reported that exposure to these films resulted in increased openness in discussing sex with their spouse, more than 20% reported lowered inhibition toward their spouse, and about 15% reported increased satisfaction with marital sex life (Commission Report pp. 192-193). Surely these are serious values which the Court means to protect; yet they flow from the most hard core of sexual materials. Nor is the study just referred to an isolated phenomenon. The Obscenity Commission's national survey questioned a representative sample of the American public extensively about exceedingly explicit verbal and pictorial sexual materials, including material showing nudity with genitals exposed, heterosexual intercourse, mouth-sex organ contact, homosexual activity and sadomasochistic materials. Over 60% of those questioned believed that such materials provide information about sex, *and almost 40% of those questioned had either experienced this effect themselves or seen it in someone they knew personally;* almost half of these

questioned believed that such materials improve the sex relations of some married couples and *over one third had either experienced this effect themselves or seen it in someone they knew personally;* more than a quarter of those questioned believed such materials give relief to people who have sex problems; and almost half believed such materials to be a source of entertainment. (Commission Report pp. 157-160). The Court's failure to recognize the fact that substantial numbers of Americans find value in what the Court may believe to be the most "flagrant" sexual materials (*Kaplan v. California, supra*), and this Court's formulation of a constitutional test of obscenity based on precisely the opposite – and therefore factually, erroneous – assumption, has caused not clarity, but utter confusion, in the meaning and application of obscenity law.

* * * * *

To sum up, the Court in *Miller* has not, as it seems to have supposed, brought an adequate degree of clarity to the test for obscenity by requiring that obscenity law apply only to previously defined descriptions or depictions of sexual conduct. Many non-obscene works describe or depict sexual conduct. It is precisely once sexual conduct is the subject matter that clarity is needed in drawing the line of demarcation between obscenity and constitutional protection. But a producer or distributor, a prosecutor or judge or juror dealing with a work describing sexual conduct is faced under *Miller* with the impossible task of determining (a) whether the book or film in question is "prurient", when that term has never been meaningfully defined, (b) whether it is prurient to the "average" person, when there is no average in such matters, (c) whether it is patently offensive to the standards of the "community", when no one knows what percentage of the persons in a place set those community standards and when it is, in any event, impossible to guess what the

different members of heterogeneous groups of Americans will find offensive, and (d) whether it has "serious ... value", when every sexual depiction – even the most extreme – would appear to have value of some substantial sort for some persons and when the Court has never told us how many and what kinds of persons must detect such value to make it constitutionally cognizable. Nor, where speech is concerned, can it be left to future cases to build up a body of law which may or may not ultimately shed more and better ligh on the meaning of "prurient" and "average" and "community" and "serious", for in the meantime, men will go to jail who failed to guess the direction the law would take, while others will forbear from publishing constitutionally protected material for fear of guessing incorrectly. If we are to have "fair notice" and "concrete guidelines" we need them now, and the *Miller* opinion, despite its fervent and undoubtedly well motivated assertion to the contrary, demonstrably does not achieve these ends.

III. The Court has inexplicably, and contrary to all precedent, applied the same constitutional test for obscenity to materials distributed privately and consensually as to materials thrust upon unwilling recipients.

At the beginning of its opinion in *Miller v. California* the Court notes that: "This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials ... *It is in this context that we are called upon to define the standards which must be used to identify obscene material* that a State may regulate without infringing the First Amendment ..." (413 U.S. at 18 and 19, emphasis added). The Court then adopts the three-part constitutional standard (appeal to prurient interest;

patent offensiveness; lack of serious value) which is discussed in the previous section of this brief. In view of the Court's introductory statement, it is apparent that this three-part test is intended as the constitutional limit upon a state's power to impose sanctions upon the thrusting of sexual materials upon unwilling recipients.

The original *Paris Adult Theatre v. Slaton*, *supra* case unlike *Miller v. California*, did not involve application of obscenity prohibitions to invasions of privacy through the thrusting of sexually explicit materials upon persons who had indicated no desire to see them. The films in *Paris* were, on the contrary, exhibited only to adults who wished to see them, after being given "full warning ... of the nature of the films shown." (41 U.S.L.W. at 4936). Yet in *Paris* the Court holds that precisely the same constitutional test must be employed as the Court applied in *Miller* to limit the State's power to deal with non-consensual invasions of privacy.

In every previous case in which the Court has addressed the definitional standard for obscenity in the context of specific prohibitions – such as prohibitions upon offending the sensibilities of unwilling recipients, upon distribution to minors, or upon specialized modes of distribution constituting "pandering" – it has explicitly held that the States and the federal government have constitutional power to prohibit a significantly *greater* range of materials under such specific prohibitions than under laws which apply to consensual distributional conduct among adults. These cases are, indeed, all cited by the Court at the outset of its *Miller* opinion just after the Court notes the specific "thrusting" context of *(See 413 U.S. at 19). Thus in Ginsberg v. New York* (390 U.S. 629, 634), involving juvenile prohibitions, the Court noted that "the ... magazines involved in the sales here are not obscene for adults" but the Court nevertheless held it

constitutional for New York to prohibit these magazines from being sold to persons under the age of seventeen. In *Ginsburg v. United States* (383 U.S. 463, 465-466) the Court "agree[d] that the question of obscenity may include consideration of the setting in which the publications were presented" and it affirmed a conviction for "pandering" certain material while "assum[ing] ... that the prosecution could not have succeeded" if "pandering" had not been made out. And in *Rabe v. Washington* (405 U.S. 313, 317), the concurring opinion of Chief Justice Burger and Mr. Justice Rehnquist explicitly noted that at least one part of the prevailing constitutional test of obscenity in consensual contexts "has little relevance" "where the very method of display may thrust isolated scenes on the public."

In holding that the same constitutional definitional limits bind the States when they prohibit direct assaults on individual privacy as when they regulate consensual distribution of sexual materials the Court thus inexplicably flies in the face of every existing precedent. Even more importantly, the Court, with all respect, flies in the face of rudimentary common sense as well. Very different governmental interests underlie prohibitions of consensual distribution of sexual materials, on the one hand, and prohibitions against the non-censensual thrusting of such materials upon unwilling recipients, on the other. The Court in *Paris Art Threatre v. Slaton* justifies consensual prohibitions largely upon the grounds that they may be viewed as necessary to protect against deterioration of the moral tone of a community and to guard against the danger that exposure to sexual materials may possibly lead persons to commit anti-social conduct. (413 U.S. at 60). "Thrusting" prohibitions flow from neither of these interests, but from the individual sensibilities of some persons in our society against being

forced to confront sexual depictions when they do not want to do so. This interest, of course, has nothing to do with prohibitions upon private consensual activity. Since the interests which give rise to the two kinds of prohibitions are so different, it would be quite irrational, to say the least, to hold that the constitutional scope of such prohibitions – *i.e.*, the materials they may regulate – must be precisely the same.

Indeed, as the Court has held on several occasions, the Constitution permits a significantly broader class of sexual materials to be included in prohibitions against "thrusting" invasions of privacy then it permits to be included in prohibitions against consensual distributions. See, for example, not only the opinion of Chief Justice Burger and Justice Rehnquist in *Rabe v. Washington, supra,* but also Chief Justice Burger's opinion for the Court in *Rowan v. Post Office Department,* 397 U.S. 728, and the Court's per curiam opinion in Redrup v. New York, 386 U.S. 767, 769. This is true because materials which offend the sensibilities of some or even many may, at the same time, have substantial and serious value for others. Those who find important values in a sexual book or film can surely not be reduced to reading or seeing only what does not offend others more easily affronted than themselves, any more than the State in *Butler v. Michigan*, 352 U.S. 380, 383, could "reduce the adult population of Michigan to reading only what is fit for children."[4]

[4] The sensible rule that there is signficantly wider constitutional power to prohibit intrusive communications than to prohibit consensual ones is not limited in application to sexual materials. The same distinction lies, for example, behind the doctrine which permits prohibiton of face-to-face "fighting words" (while the same words are constitutionally protected in consensual contexts) and in the doctrine which

If, then, the three-part test of *Miller v. California* is, as the Court appears to hold in that case, the appropriate constitutional limit on a State's power to prohibit sexual materials in a context where they are aggressively thrust upon unwilling recipients, significantly stricter constitutional limits must apply against States when they seek to prohibit consensual distributions of sexual materials. On the other hand, if *Paris Theatre v. Slaton* correctly holds that the three-part *Miller* test is the appropriate constitutional definitional limit where consensual distributions are involved, then *Miller* confines much too narrowly a State's power to deal with deliberate "thrusting." Unless every case ever decided on the subject is to be discarded *sub silentio*, and unless plain reason is to be completely read out of constitutional obscenity law, the Court should grant rehearing to determine, at a minimum, which of these two logically and legally inconsistent cases is the correct one.

Upon reconsideration, it appears likely that the Court would conclude that the *Miller* test is, as *Miller* held, the proper type of limit where intrusive thrusting conduct is involved and that a different and narrower standard is needed if consensual distributions are to be constitutionally regulated. Except for its intolerable but perhaps curable vagueness, the *Miller* approach seems well suited to invasions of individual privacy. The second prong of *Miller's* three-part standard –

(Footnote 4 Continued)

permits loud and raucous amplification devices to be regulated or barred, when the identical message would be afforded full constitutional protection in a non-intrusive context. See *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Kovacs v. Cooper*, 336 U.S. 77.

patent offensiveness – is directly related to the desire to protect against intrusion upon individual sensibilities. If the "prurient interest" prong is read, as it might be, to relate to materials which cause uneasy or morbid or shameful feelings in some recipients, then that prong also is tailored to deal with offense to sensibilities. In that context, a "serious ... value" criterion may also make good sense – if such values are actually present it would seem appropriate to find that they count more heavily in the constitutional scale then offended feelings.

On the other hand, the reasons upon which the Court relies, in *Paris v. Slaton,* to legitimate prohibitions upon consensual distributions of sexual materials are reasons going mainly to the preservation of morality and the desire to prevent sexual material from contributing to anti-social conduct. A proper constitutional test here would not turn on offensiveness or pruriency – for these elements, whatever they mean, heaven't the slightest relationship to the supposed evils involved – but would require the finder of fact to determine whether the materials at issue have, in fact, been sufficiently proved to contribute to immorality or crime. Upon reconsideration of the novel concepts of constitutional judgment applied by this Court in the five (5) obscenity cases decided June 21, 1973, on which the Georgian Supreme Court predicated it's decision in the case at bar, this Court would have the opportunity to adopt a constitutional definition of "obscene" for consensual distributions which reflect the State interests – if any – which support prohibition of these distributions.

IV. In holding that "obscene" material is "unprotected by the First Amendment", the Court relies upon historical "facts" which are untrue and irrelevant. Absent this false historical premise, there is no basis for holding that certain materials on sexual subjects are, because of their explicit contents, undeserving of the constitutional protection afforded to other pure speech.

A. *History does not support exception to the First Amendment for material which Miller v. California defines as "obscene."*

Miller v. California (413 U.S. at 29) states that the power to prohibit obscenity is a power which the States "have enjoyed and exercised continuously from before the adoption of the First Amendment to this day." This is untrue. The historical background of obscenity prohibitions is set forth both in the Report of the Commission on Obscenity and Pornography (pp. 296-302) and in this Court's opinion in *Roth v. United States*, 354 U.S. 476, 482-483. There is no disagreement on the essential facts and they ary not as the Court describes them.

It is difficult to understand what evidence the Court relies on in asserting in *Miller* that the States "exercised" the power to prohibit "obscene" materials "from *before* the adoption of the First Amendment." The fact is that only one of the American Colonies – Massachusetts – had anything resembling an obscenity statute prior to the adoption of the First Amendment, and even this law, which was directed at religious blasphemy, appeared to apply not to "obscene" sexual materials as such, but only to such materials when "in imitation or in mimicking of preaching, or any other part of divine worship." Province Laws, 1711-12, ch. 6, Section 19.

There were no recorded prosecutions of sexual materials under this Massachusetts Statute until 1821. Contrary to the Court's statement, every other colony left sexual materials entirely unregulated by the criminal law. The first state obscenity statute was enacted by Vermont not before the First Amendment, but in 1821. Statutes in other states followed slowly over the next 80 years. The first effort – in either the colonies or the states – to use the common law against obscenity occurred in Pennsylvania in 1815, 24 years after the First Amendment. There was another prosecution under the common law and the Massachusetts Statute 6 years later.

The facts are, then, that *no* state exercised the power to prohibit sexually "obscene" materials "before the adoption of the First Amendment," that tentative state efforts in that direction were first commenced more than two decades after the Amendment was adopted, and that obscenity prohibitions in the United States did not become commonplace until 50 or more years after the First Amendment. (See Commission Report, p. 301) Moreover, the first federal obscenity statute was enacted in 1842 (5 Stat. 566) – it prohibited importation but applied only to pictorial materials. Obscenity was not prohibited in the federal mails until 1865, 74 years after the First Amendment (13 Stat 507).

Thus the states plainly did not "exercise" the power to prosecute "obscene" sexual materials before the adoption of the First Amendment or even shortly after its adoption. The Court's companion assertion that the States "enjoyed" this power prior to the First Amendment is equally puzzling. The Court, perhaps, assumes that the common law, although not actively applied in the United States against obscenity, still

recognized the distribution of obscene sexual materials as an offense prior to 1791. This assumption on the Court's part would be totally unfounded. In the absence of reported American obscenity cases, the common law in the colonies on the subject was presumably the same as the common law as it existed in England prior to American independence. Contrary to what many people may suppose today, Eighteenth Century English common law did *not* hold sexual obscenity to be indictable. Quite to the opposite effect, it was authoritatively established in 1708 (*Queen v. Read*, 11 Mod. Rep. 142) that the distribution of "bawdy" sexual materials did not constitute an offense.[5] During the Eighteenth Century, sexual materials were punished in England only if they attacked religion. (*King v. Curl*, 2 Stra. 788 ("Vensus in the Cloister or the Nun in her Smock"); *Rex v. Wilkes*, 4 Burr. 2527; *King v. Gallard*, W. Kelynge, p. 162.) The Obscentiy Commission Report (p. 299) comments that "some very sexually explicit books and pamphlets of the type often referred to today as hard-core pornography circulated quite freely in England throughout the 18th Century, apparently because their lack of anti-religious content kept them outside the law's proscription."

The Court is thus wrong to suppose that the framers of the First Amendment must have understood an exception to the freedoms of speech and press in the case of certain explicit sexual materials which might be regarded as

[5] The work involved in *Read* was "The Fifteen Plagues of a Maidenhead." The court held the book to be "bawdy stuff," but since it libelled no one, did not reflect upon the government and did not attack religion, it was held to be "punishable only in the spiritual court."

"obscene." Some of the framers may privately have harbored such a view, but they could not have based it on existing law at the time, for these simply was no such law. The wide-spread notion that certain explicit sexual depictions or descriptions are "obscene" and unlawful is largely a product of Victorian times. That concept was unknown to Anglo-American law at the time of the Revolution and the framing of the Constitution.

While the Court is thus in error regarding the legal status of explicit sexual materials at the time of the adoption of the First Amendment, it may perhaps believe that materials which fall under the *Miller* definition of obscenity can nevertheless be regarded as "outside" the First Amendment on the basis of a long period of years during which such materials have been outlawed. It is true that sexual obscenity prohibitions, while they neither predate nor were contemporaneous with the First Amendment, do go back 100 years or more in most American jurisdictions. But there are two insuperable difficulties in using these years of history to establish an exception to the First Amendment for what *Miller* today defines as "obscene." In the first place, to establish an exception to a constitutional guarantee through years of recognized practice, one would suppose that that practice would have ultimately to be recognized as having constituted a *constitutional* course of action. Yet for virtually all of the years during which obscenity laws were commonplace in America prior to this Court's 1954 *Roth* decision, there laws were plainly *unconstitutional*. They used, as their test of obscenity, the standard of the 1868 English case of *Regina v. Hicklin*, L.R. 3Q.B. 360. In *Roth*, this Court for the first time considered

the constitutional status of obscenity law under *Hicklin*. To held that the *Hicklin* test "must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U.S. at 489.[6] An exception to the First Amendment is not established through an "unconstitutionally restrictive," albeit widespread, practice.

Secondly, even if years of unconstitutional practice under *Hicklin* could magically be transformed into a constitutionally reputable exception to the First Amendment, the fact is that *Hicklin* prohibited a wholly different category of sexual materials from that prohibited under the *Miller* three-part formulation. *Hicklin* prohibited a whooly different category of sexual materials from that prohibited under the *Miller* three-part formulation. *Hicklin* applied to books and pictures which have a tendency "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands ... [they] may fall." It is quite clear that a book or film could tend to "deprave or corrupt" particular readers or viewers without appealing to the "prurient interest" of the "average person" in a patently offensive way, while lacking "serious ... value." For example, a film extolling the virtures of adultery but depicting no sexual conduct would likely violate *Hicklin*, but could not possibly be "obscene" under *Miller*. On the other hand, it is equally clear that a work may fit the *Miller* criteria without tending to deprave or corrupt anyone. In many ways, *Hicklin* is a much *narrower* test than *Miller*, for it requires a finding that the particular work in question will actually have a lasting and seriously adverse behavioral or psychological impact upon some persons

[6] See also the Court's reference in *Miller* to the "now discredited test in *Regina v. Hicklin*." (413 U.S. at 33).

who read or set it. *Miller*, on the other hand, places its emphasis on pruriency, offensiveness and lack of value – traits which may easily exist without any danger of corruption or depravity to anyone.

To hold that the sexual materials, which *Miller* defines as obscene, are outside the First Amendment because quite different sexual materials defined by *Hicklin* were once thought to be outside, the First Amendment is to defy logic. It is as if the Court had held (as it did not) that because one form of financial aid to religion – say tax exemptions on Church property (see *Walz v. Tax Commission*, 397 U.S. 664) – was constitutional because of years of recognized practice, another different form of aid – say direct supplements to religious school teachers' salaries (see *Lernon v. Kurtzman*, 403 U.S. 602) – was also constitutional because it, too, was "state financial aid to religion." *Hicklin* and *Miller* are wholly different concepts of "obscenity," albeit they both relate to materials on sexual subjects. Even if obscenity as defined in *Hicklin* were established as being "unprotected by the First Amendment," it would take a fresh set of arguments – not merely reliance on history – to show why obscenity as defined by *Miller* should also be "unprotected." And of course it is now established that obscenity as defined under *Hicklin* was, in fact, not unprotected by the First Amendment at all. Whence, then, the Court's bland assertion in *Miller* that "This much has been categorically settled by the Court, that obscene material [as defined by *Miller*] is unprotected by the First Amendment." (413 U.S. 23).

B. *Absent the Court's false historical prop, there is no basis for treating sexual materials defined by Miller as "obscene" as unprotected by the First Amendment.*

The Court's finding that the sexual materials defined by *Miller v. California* are unprotected" by the First Amendment is at the heart of its holding, in the cases decided on June 21, 1973, that such materials may be completely prohibited from consensual distribution to adults. If the materials defined by *Miller* were deemed "protected" by the Amendment – as, for example, is the case with offensive but non-erotic speech (*Cohen v. California*, 403 U.S. 15) and non-malicious libel of public officials (*New York Times Co. v. Sullivan*, 376 U.S. 254) – *then it is extremely doubtful that anyone would seriously suggest that the requisite "clear and present danger"* existed to justify prohibition of consensual transactions in such materials. Certainly neither the Court as a whole nor any individual Justice in any of the obscenity cases during the last two decades has argued that a clear and present danger could be traced to "obscene" materials as *Miller* defines them. Quite to the contrary, *Roth* found a "complete answer" to the contention that obscene material creates no clear and present danger in its holding, not that such a danger exists, but that obscenity "is not protected speech." 354 U.S. at 486.

We have shown above that history does not provide a basis for determining that the specialized class of sexual materials described in *Miller* is "not protected speech." The fact is, however, *that the Court has never relied upon anything except history in assuming that 'obscenity is constitutionally unprotected.* Cases since *Roth v. United States* have relied exclusively on *Roth* in parroting that constitutional dictum and *Roth*, in turn, placed all its reliance upon the untrue assertion that obscenity prohibitions predated the First Amendment and the irrelevant fact that unconstitutional obscenity provisions employing the *Hicklin* standard had existed for many years. (See 354 U.S. at

481-485.) If the Court were merely reaffirming *Roth* today, it would perhaps be justifiable for it to ignore *Roth's* massive historical and logical errors and accept the constitutional conclusion which *Roth* based upon those errors. But the Court in *Miller* propounds a substantially different definition of what is "obscene" from that used in *Roth* (nowhwere does *Roth* restrict obscenity laws to sexual conduct or refer to either "patent offensiveness" or to "serious literary, artistic, political or scientific value"), while recognizing that *Roth's* rule was not constitutionally viable because of its failure to provide either "fair notice" or "concrete guidelines" regarding the limits of the First Amendment. If we are, as *Miller* proposes, now for the first time to have constitutionally valid obscenity laws, the Court should wish these laws to be based upon sound premises.

The recent history of the concept of pure speech which is "unprotected" by the First Amendment even in a consensual context has not been a happy one. As examples of such "unprotected" speech, for example, the *Roth* opinion cited blasphemy, profanity and libel, in addition to obscenity. (354 U.S. at 482-483). Blaphemy, however, was held constitutionally protected by the First Amendment in *Burstyn v. Wilson,* 343 U.S. 495, and profanity was afforded similar protection in *Cohen v. California,* 403 U.S. 15. A much stronger case can be made for withdrawing constitutional protection from libel, for defamatory statements constitute a real and often extremely harmful injury to another human being. Yet even here it is no longer remotely accurate to say that libel is "unprotected" by the First Amendment. Under New York Times Co. v. Sullivan, *376 U.S. 254, and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, libel is* afforded full constitutional protection in many, if not most,

of its manifestations. Perhaps the only area where it is any longer accurate to describe speech as "unprotected" by the First Amendment is that of commercial fraud, deceit and misrepresentation, and the very closely related areas – such as the "blue sky" laws to which the Court refers in *Paris Theatre* – where lack of truth or full disclosure is penalized in connection with the sale of goods or securities. Like libel, these types of speech all involve a great and demonstrable threat of immediate harm to another individual – i.e., the person to whom the speech is directed. These types of prohibitions are so different from obscenity laws that the Court in *Roth* did not even think to mention them as examples of "unprotected" forms of expression.

If a category of speech relating to sexual subjects, which speech does no demonstrable harm to any individual or group, is now to be wholly excluded from First Amendment protection because of the manner in which the sexual subject matter is treated, that doctrine would constitute a distinct – indeed a unique – constitutional anomaly. What *reason* is there to say that, merely because words or pictures treat sexual conduct in a way which the average person finds prurient, offensive, and without "serious" value, they are no longer to enjoy the constitutional protection which the First Amendment affords to all other words or pictures which do no demonstrable immediate harm? Sexual conduct is certainly as legitimate a topic for books or films as any other form of human conduct. See *Roth v. United States*, 354 U.S. at 487: "The portrayal of sex ... is not itself sufficient reason to deny material the constitutional protection of freedom of speech or press." Explicitness regarding a legitimate subject of interest is surely not itself an evil. Why then do explicit portrayals of sex need to find favor – even "serious" value

– in the eye of the average person to qualify for constitutional protection? The First Amendment is neither designed nor needed to protect what the average person finds benign or useful. Such speech is in no danger of suppression in any event. The great function of the First Amendment is to protect expression which the average person finds distasteful, disturbing and without value, yet that is precisely the speech which, when it involves explicit sex, the Court in *Miller* holds "obscene" and "unprotected." Conformity of treatment and taste is required in sexual subjects and nowhere else. Why?

Despite the Court's repeated protestations to the contrary, one suspects that the answer to these nagging questions about sex and the First Amendment is that a majority of the Justices believe that sex – unlike all other topics – needs to be treated in what most people consider a decorous manner to come within the constitutional guarantees. The Court in *Miller* applauds the recent "striking [of] layers of prudery from a subject long irrationally kept from needed ventilation." (413 U.S. at 36)). If this is indeed beneficial, then it is time to strike the last irrational, and most harmful layer of prudery – the need to confine sexual expression within a mold which the "average" person finds acceptable in order for that expression to see the light of day. "Civilized people" (see *ibid.*), do not demand conformity of taste in the treatment sexual or any other controversial topics as the price of being permitted to communicate.[7]

[7] The Court attempts to justify the limited scope which it gives to the First Amendment in the area of sexual communication by stating that "the First Amendment protects works which, taken as a whole, have serious literary, artistic, policial or scientific value" *Miller v. California*, 413 U.S. at 36-37) and by noting that the material defined in

V. The Court's attempts to distinguish *Stanley v. Georgia* are unavailing. Either that case must be overruled, or the constitutional right to obtain sexual materials for private reading or viewing must be recognized.

A. As noted above, the crux of the Court's opinions of June 21, 1973, is the holding that "obscene material is unprotected by the First Amendment." In *Stanley v. Georgia,*

(Footnote 7 Continued)
Miller as "obscene" "by definition" lacks any such value. *(Paris Theatre v. Slaton.)* The Court offers no citation for the proposition that the First Amendment only protects works found to have ',serious ... value" and that is not surprising, for thy law is quite the opposite. "This right to receive information and ideas, *regardless of their social worth* ... is fundamental to our free society." *Stanley v. Georgia,* 394 U.S. 557, 564 (emphasis added.) "Though we can see *nothing of any possible value* to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters v. New York,* 333 U.S. 507, 510 (emphasis added). " *'Wholly neutral futilities* ... come under the protection of free speech as fully as to Keats' poems or Dunne's sermons.' " *Cohen v. California,* 403 U.S. 15, 24 (emphasis added).

The Court makes the mistake of equating the *purposes* of the First Amendment with the *application* of that Amendment to specific materials. It may well be that the purpose of the First Amendment is to protect that which has value – even "serious" value – for our society. But serious value cannot be the *test* under which First Amendment protection is conferred or withheld because that would give to judges an; jurors the power to ban speech because *they* could not perceive its value. That kind of censorship is precisely what the First Amendment is designed to stop. History is replete with examples of totalitarian censorship of materials which a majority at the time found worthless or harmful. The

394 U.S. 557, 559 n. 2, appellant was prosecuted for possession of material which the Court assumed was "obscene under any of the tests advanced by members of this Court." *Stanley* held, in the context of a prosecution for possession of such obscene material, that "If the *First Amendment* means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." 394 U.S. at 565 (emphasis added). If the First Amendment protects the right to read or see obscenity in the circumstances of the *Stanley* case, it simply cannot be true, as the Court states, that obscenity is "unprotected by the First Amendment." Nor can the protection which the First Amendment thus affords to obscenity (unless *Stanley* be overruled) be limited, as the Court suggests, to "a place, the home." (*Paris Theatre v. Slaton*, fn. 13) As the Court recognizes in *Miller v. California*, quoting from *Roth*, " 'The protection given speech and press was fashioned to assure unfettered *interchange* . . . .' " The framers certainly did not contemplate that the "interchange" they meant to protect would occur exclusively in people's homes – in secret cell meetings or the like. If a given "obscene" book or film is thus protected by the First

(Footnote 7 Concluded)

only way in which we can insure that all ideas which may ultimately have value will be free to circulate – and thus guard ourselves against totalitarian orthodoxies – is to refuse to judge officially the value or worth of individual books or films, but to leave that question to the author and his readers. These are not new ideas conjured up by amicus – they are the most fundamental tenets of our democratic heritage. The Court will perform a most dangerous disservice to our Constitution if it leaves outstanding the notion that the First Amendment is only available to those who can prove to the rest of us that his book or film has "serious value."

Amendment when read or viewed in the home by a solitary individual – as *Stanley* holds – then it is *a fortiori* protected by the First Amendment when it is part of an interchange between human beings, in the home or elsewhere. The Court, we believe, has an obligation to confront and remove these basic contradictions between its opinions of June 21 and the *Stanley* decision.

B. Contrary to the explicit language of *Stanley*, the Court reads that case as dealing exclusively, not with the First Amendment, but with a right of "privacy" which the Court believes can logically and tenably be confined to "the home." Even if the Court were correct in viewing *Stanley* as dealing only with privacy, and even if the Court were additionally correct in finding that *Stanley's* right of privacy – to read or see any sexual materials, including those which might be defined as "obscene" – could somehow be rationally confined to the home (a contention which we take up below), the Court would still be seriously and demonstrably in error in holding that a person does not have a constitutional right to obtain sexual materials outside the home in order to exercise his limited privacy right within that enclave.

One need look no further than *Griswold v. Connecticut*, 381 U.S. 479, the fountainhead of the modern constitutional right of privacy, to see why this is so. *Griswold* recognized a constitutional right of privacy in the *use* of contraceptives by married persons. But the defendant doctors in *Griswold* were not prosecuted for using contraceptives, they were prosecuted for giving information and advice intended to aid married persons in exercising their constitutional right of privacy to use contraceptives. The Court held that the defendants in *Griswold* had standing to raise the rights of contraceptive

users who were their patients, and it *then went on to thold that the constitutional privacy rights of married users of contraceptives were infringed by the prosecution of persons for facilitating that use.* See also *Eisenstadt v. Baird,* 405 U.S. 438, which reaches an identical conclusion.

There is an exact parallel between *Griswold* and the prosecution of a distributor of allegedly "obscene" sexual materials who sells these materials to a customer who wishes to obtain them for purposes of reading or viewing the materials in the privacy of his own home. In *Griswold* the *user* of contraceptives had the constitutional privacy right, but the prosecution of one who aided or facilitated the exercise of that right (the aid was, incidentally, only given for a fee in most cases) was held to be unconstitutional because it constituted an interference with the right of the user. In the obscenity stiuation, the customer who buys sexual materials has a constitutional right of privacy under *Stanley* to read those materials in his home. The prosecution of one who seeks to facilitate the customer in exercising his privacy right, by selling him the materials he wishes, must also be unconstitutional as constituting an interference with the customer's privacy right. Indeed, the interference with the recognized right of privacy through prosecution of one who facilitates constitutionally protected use is much greater in the obscenity situation than in the case of contraceptives. The inability to obtain a doctor's advice and information would not, presumably, wholly prevent a person from using contraceptives, if he so wished. But the constitutional right in *Stanley* is to read books and see films *which are written and produced by others.* Unless the Constitution protects the right to obtain such books and films, the right which *Stanley* recognizes is a legal nullity.

Thus, once the Court assumes, as it does in *Paris Theatre v. Slaton* (413 U.S. at 49), that distributors and sellers of sexual materials have "standing to assert potential customers' rights," it cannot permit prosecution of a vendor of sexual materials for private use (as it does in *Kaplan v. California*, supra without overruling *Stanley* or *Griswold* or both. Again some explanation of these contradictions is urgently required.

C. Finally, reason and logic simply will not permit the Court's attempt to limit the right recognized in *Stanley v. Georgia* so that that right is exercisable only within "the home." At a minimum, the *Stanley* right to read or view whatever sexual materials one wishes must extend to other places where people traditionally repair when they wish to read books or see films – to libraries, to park benches, to the shade of an oak in a favorite meadow or the dunes of a favorite beach and, in the case of films, theater or lectures, to theatres and auditoriums which are the only places where such works are ordinarily accessible. The Constitution does not require that readers be recluses.

We fully agree with the Court that there is often a necessity for "line drawing' familiar in the judicial, as in thy legislative process: 'thus far but not beyond.' " (*United States v. 12 200-Ft. Reels*, 413 U.S. 125, 126). But unlike legislative line drawing, which may legitimately be done for political, experimental and numerous other reasons which flow from expediency rather than principle, judicial line drawing bears a special responsibility. The lines here must respect and flow from the reasons for the underlying rule of law. Judges do not have the legitimate power to say "thus far but not beyond" unless they can relate that limitation to underlying principles. Judges, in short, cannot be arbitrary. That is the nature – and genius – of the judicial process.

To make the right of *Stanley* applicable only in the home is wholly to ignore the principle which the *Stanley* opinion set forth as that which gave rise to that case. *Stanley* is based upon the holding that "the Constitution protects the right to receive information and ideas." 394 U.S. at 564. "This right to receive information and ideas, regardless of their social worth" is, said the Court "fundamental to our free society." (*Ibid.*)[8] It is true that *Stanley* arose in the context of a prosecution for receiving information and ideas within the confines of the defendant's home, and that the Court reiterates that fact repeatedly in its opinion, and even describes it as giving "added dimension" to the underlying right to receive. That kind of careful statement of the ruly of law in the particular factual context is a judicial commonplace, especially when, as in *Stanley*, new ground is being broken. A court cannot be clairvoyant. A principle which appears correct in the context before the court may not apply to other contexts not before it, hence the statement of principle is made no broader than necessary to decide the case at bar. The limited statement of holding in

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[8] *Stanley* was not, as thy Court asserts, merely "a reaffirmation that 'a man's home is his castle.' " (413 U.S. at 66). If that were the basis of *Stanley*, it would apply to *any* possession crimes within the home. Yet the *Stanley* court explicitly noted that "what we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms or stolen goods, a crime." 394 U.S. at 568 n. 11. The difference, said thy Court, is that "no First Amendment rights are involved in most statutes making mere possession criminal." (*Ibid.*) That is, most invasions of the "castle" do not involve "the right to receive information and ideas" upon which *Stanley* is based.

these circumstances is not a holding that the principle is inapplicable in other settings, it is merely a holding that the principle is *at least* applicable on the facts before the court.

Thus when a new case arises, where the principle found previously valid is asserted to apply in a new factual context, the court cannot simply say, of the prior holding, "thus far but not beyond." It has, instead, to decide whether the principle previously found applicable in one setting is, in actuality, equally applicable in the new setting. In the cases decided on June 21, 1973, the Court was therefore obligated to decide whether the "right to receive information and ideas, regardless of their social worth" which the Court in *Stanley* found "fundamental to our free society" when exercized in the home, is any less fundamental when exercized in a library, on a park bench, or in a theater. The opinions are totally devoid of any such analysis.

The right to receive information does not easily limit itself to one exercisable only within the confines of the citizen's home. In these days of radio and television it is true that much information is received directly into the home, but it was not always so, and we cannot imagine tha the Court means to limit the right to receive information to data flowing exclusively through those two media. To get facts and ideas elsewhere, a person inevitably must leave his home, or send another on the mission for him; and even once in possession of a book, a person may simply prefer to do his reading in the open air. This is not to say that, outside the home, the right to receive information may not be subject to certain restrictions, for example that in receiving information of one's choice one does not thrust or force that information upon others who do not wish to receive it. But the Court

held on June 21 not that there could be reasonable restrictions on the right to receive allegedly "obscene" sexual materials outside the home, but that there was no right to receive or study those materials, in any circumstances, beyond one's doorstep. The Court owes some explanation about why, in a highly mobile and socialized society, a right to receive and study communications from others is not recognized except in the particular place where one happens to live.

VI. Even if the Court were correct in holding that the consensual distribution of certain sexual materials is protected neither by the First Amendment nor by the right of privacy, the Court nevertheless offers no tenable basis for prohibiting such distributions.

Having held that the consensual distribution of "obscene" sexual speech, as defined in *Miller v. California*, is protected neither by the First Amendment nor the constitutional right of privacy, the Court holds that there are "legitimate State interests at stake" in prohibiting such distributions to adults. (*Paris Theatre v. Slaton*, 413 U.S. at 57). The Court appears to rely upon four separate state interests. In fact, none of them affords a legitimate basis for prohibiting consensual distributions of sexual materials.

A. The Court refers to the "tide of commercialized obscenity" (413 U.S. at 57) and "crass commercial exploitation of sex" (413 U.S. at 63). If the distribution of obscenity were harmful, then of course its commercial distribution would be as harmful as non-commercial distribution. But the commercial nature of an activity does not, in and of itself, make the activity harmful. "It is of course no matter that the dissemination takes place under commercial auspices." *Smith v. California*, 361 U.S. 147, 150.

Nor can we understand the basis for or relevancy of the Court's characterization of the activities of the Paris Theatre as "crass" or of the marketplace in sexual materials as a "tide." The Paris Theatre simply showed films for an admission charge, and the volume of sexual materials is quite small as compared to the volume of books and films generally. (See Obscenity Commission Report, pp. 7-19.) If it is "crass" to charge admission to a film on a sexual subject, is it equally "crass" to charge admission to a western adventure film or a musical comedy? Does the Court believe there is a "tide" of commercialized detective novels? These unseemly epithests hardly aid analysis or provide a basis for the regulation of human conduct.

B. The Court asserts that "the legitimate interest in preventing exposure of juveniles to obscene materials cannot be fully served by simply barring juveniles from the immediate physical premises of 'adult' bookstore, when there is a flourishing 'outside business' in these materials." (*Paris Theatre v. Slaton*, 413 U.S. at 58 n. 7.) The Court thus seems to assert that sales of sexual materials to adults may be prohibited for the purpose of keeping these materials from children, when the materials may be harmful to children but are not harmful to adults. This assertion was squarely rejected by a unanimous Court in *Butler v. Michigan* '352 U.S. 380, 383 (opinion by Mr. Justice Frankfurter), where the Court noted that its unconstitutional effect would be "to reduce the adult population of Michigan to reading only what is fit for children." Many substances may be unsuitable or unfit for children and there is often no way to be absolutely certain that, once sold to adults, they may not find their way into the hands of minors. So far as we are aware, this has never before been thought to justify their total prohibition and

their consequent deprivation to the whole adult population. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan, supra,* at 383.

C. The Court appears to hold that states may prohibit sexual materials in the interest of preventing crime and anti-social behavior. (413 U.S. at 57-59.) The Court's reasoning is in two parts. First, the Court states that, based on empirical evidence, "there is at least an arguable correlation between obscene material and crime." (413 U.S. at 58.) Then the Court argues that, apart from any evidence, a state may assume that, since "good books, plays and art lift the spirit, improve the mind, enrich the human personality and develop character" it follows that obscene books "have a tendency to exert a corrupting and debasing impact leading to anti-social behavior." (413 U.S. at 63.)

(1) The Court's argument that there is an "arguable correlation" between obscene material and crime is remarkable in its failure even to allude to the findings on this subject of the majority of the Commission on Obscenity and Pornography. This Commission was created and funded by Congress. Its members were appointed by the President of the United States. Its main delegated function was "to study the effect of obscenity and pornography upon the public . . .and its relationship to crime and other antisocial behavior." (P.L. 90-100; 81 S. Ct. 253, 254). After two years of study, which included a thorough study of all existing research as well as a substantial amount of new research, the *unanimous* Effects Panel of the Commission, composed of eminent social scientists (not one of whom had any connection whatsoever with the sexual materials industry) concluded that "If a case is to be made against 'pornography' in 1970, it will have to

be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults." (Commission Report, p. 139). The full Commission agreed with this finding (Report, p. 27). There were but 4 dissents (out of 18 Commission members) to the recommendations which were based upon it, and no explicit dissents from the finding itself. (Report, pp. 27, 52).

While wholly ignoring the unanimous conclusion of the Obscenity Commission that there is no reliable evidence showing a correlation between sexual materials and crime, the Court chooses to rely instead upon a dissent written by two Commission members for the proposition that there is an "arguable correlation." Neither of these dissenters was a social scientist and both had long-term and continuing commitments to groups dedicated to the elimination of explicit sexual materials from our society. (See Commission Report, pp. 635, 637-638.) The dissent attacks the veracity and motives of the majority Commissioners' finding that no correlation between obscenity and crime can be established. Perhaps the majority *is* incorrect, but the Court – if it believes in the power of truth – is certainly not entitled to so conclude on the mere say-so of two dissenters, without some independent critical examination of the extensive research and data upon which the majority's conclusions were based. The Court seems to be saying, in effect, that if *anyone*, no matter what his biases and preconceptions, concludes contrary to all the evidence and the conclusions of a body created by Congress to study the question, that obscenity may cause crime, then States are

constitutionally entitled to act on the assumption that it does. The Court might as well completely abandon any requirement that legislation have a rational basis.

The Court, moreover, even misrepresents the position of the two Obscenity Commission dissenters upon whom it purports to rely. These men did *not* assert that there was a correlation – "arguable" or otherwise – between obscenity and crime. Their position was quite the opposite: "We believe it is impossible, and totally unnecessary, to attempt to prove or disprove a cause-effect relationship between pornography and criminal behavior." (Hill-Link Minority Report, p. 386). They stated further: "The government interest in regulating pornography has always related primarily to the prevention of moral corruption and *not* to prevention of overt criminal acts and conduct." (Report, p. 385 [emphasis in). The Court does not explain how these assertions of the irrelevancy and impossibility of showing a correlation between obscenity and crime can be used to establish that such a correlation "arguably" exists.

The Court writes about the question of a correlation between obscenity and crime as though it had never previously considered the issue.[9] In *Stanley v. Georgia,*

[9] The Court does rely upon a *dissenting* opinion by Mr. Justice Clark, written in 1966, that some doctors believe that obscenity causes crime. This opinion was written four years before thy Obscenity Commission Report on the subject, which thy Court has chosen to ignore. Justice Clark's conclusions were, moreover, subsequently rejected as a basis for obscenity regulation by the majority of the Court in *Stanley v. Georgia,* as discussed in the text.

however, the Court addressed the assertion by the State "that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." The Court noted that "there appears to be little empirical basis for that assertion." The Court then concluded that, "Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." (394 U.S. at 566, 567.) The Court in *Stanley* thus rejected, as a basis for regulation of "obscene" materials, the precise "arguable correlation" upon which the *Paris Theatre* opinion relies. The Court in *Paris Theatre* does not explain why the correlation is any more validly "arguable" today than it was in 1969.

(2) The Court's assertion that since "good" books have good social effects, "obscene" books may be presumed to lead to antisocial behavior is a *non-sequitur.* For this statement to have any meaning, it would have to be assumed that all books fall into one of two mutually exclusive categories – "good" and "bad" – and that obscene books were inevitably "bad". That books are inevitably either "good" or "bad" is, however, patently untrue. Many – perhaps most – books are neither "good" nor "bad", they neither uplift nor corrupt, they merely entertain or pass the time. What, then, is the basis for the Court's assumption that "obscene" books must be bad, rather than morally neutral or even good? Only one supposes, the Court's belief that obscene books have had effects. That, however, is the very question at issue. In the absence of any *evidence* that obscene books have had effects, the Court cannot establish

that they have had effects through a syllogism which begins by assuming, without any evidence, that they have bad effects.[10]

D. The Court asserts that states may prohibit private consensual distributions of sexual materials in order to protect the "'tone of the society'" and to "'maintain a decent society.'" (413 U.S. at 59.) The fallacy in this assertion is the same as the fallacy in the Court's reliance upon the assumption that "obscene" books are "bad" books. Granted that society may maintain "decency" and an appropriate level of "tone". But in the absence of evidence that "obscene" sexual materials have any bad effects whatsoever, what is the basis for concluding that the private consensual distribution of such materials is antithetical or decency or that such materials will lower the societal tone? Once again the Court appears to use an assumption that "obscene" materials are bad to justify its conclusion that they may legitimately be regarded as bad.

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[10] We note that the Court's reasoning would be on much firmer ground under the obscenity test of *Regina v. Hicklin*, *supra*. Under that test a book could not be found to be obscene unless it was found to have a tendency to "deprave or corrupt." If a book were found obscene under *Hicklin* it would then be rational to find it a "bad" book in the sense of its probable antisocial impact upon at least some readers. But the *Miller* test which the Court substitutes for the "discredited" test of *Regina v. Hicklin* does not require a finding of a tendency to deprave or corrupt in order to find a book "obscene." If a book can thus be "obscene" without a tendency to deprave or corrupt, it is not logically permissible to assume, as the Court does, that obscene books inevitably tend to deprave and corrupt.

Perhaps in recognition of the circular nature of these arguments, the Court alludes to Professor Bickel's remarkable assertion that the private consensual distribution of sexual materials "'impinges upon other privacies'" (413 U.S. 59) so as to legitimate prohibitions. The argument seems to be that, if A and B and many others wish to exchange sexual materials in the "marketplace," C will inevitably know about their activities, although he is completely free to ignore them. If C does not approve of A's and B's activities, then C's "privacy" is impinged upon, apparently because C has a right of "privacy" not to know about conduct of which he disapproves. Thus the State may prevent A and B from doing what they wish, in order to protect C's "privacy" in stopping activities he dislikes in others.

Professor Bickel's asserted "privacies" are, in truth, nothing more than the interests of busybodies in telling others what they can and cannot do – quite the antithesis of privacy. Nor does Professor Bickel tell us why A's and B's "privacy" somehow applies only to what they do in their own homes, while C's "privacy" extends to whatever everyone else does anywhere in the community. If anyone's privacy is at issue, it is that of those who wish consensually to exchange materials without thrusting or forcing them on others, not that of those who wish to use the criminal law to force their fellow citizens to engage only in conduct of which they approve.

VII. Rehearing is required by the Court's complete failure to consider the relevant research and conclusions of the Commission on Obscenity and Pornography.

In 1967 Congress established the Commission on Obscenity and Pornography for the purpose of studying the

traffic in, effects of and legal considerations relating to explicit sexual materials. (P. L. 90-100, 81 Stat. 253). The Commission issued a voluminous Report in 1970. This Report summarized the state of scientific knowledge about explicit sexual materials at the time of the Commission's creation, as well as the results of extensive research carried out under Commission auspices during the Commission's life.

As noted in earlier portions of this brief, many of the Commission's findings bear direct relevance to the legal issues involved in the obscenity cases decided by the Court on June 21, 1973. In particular, the Commission devoted substantial energy and resources to studying the alleged "average" prurient interest appeal and patent offensiveness of certain "hard-core" sexual materials, as well as the assertion that these materials are lacking in social value. The Commission also studied assertions that hard-core sexual materials cause crime, other antisocial behavior and destructive or deviant personal attitudes. The Commission studied the question of whether obscenity laws had sufficient clarity to provide "fair notice" and "concrete guidelines" to those who must obey and enforce these laws. The Commission sought to discover what types of laws would have adequate clarity. The Commission studied the history of obscenity prohibitions to see whether it is accurate to characterize certain sexual materials as unprotected by the Constitution.

Despite the direct relevance of the Commission's research to the legal issues before the Court, *there is not one mention* of the Commission's findings on these matters in any of the majority's opinions in the June 21 cases. As we have shown in previous sections of this brief, these findings in fact contradict the Court's unsubstantiated assumptions in many areas.

One could perhaps understand this cavalier treatment of a substantial body of directly relevant research and findings of the Commission were an unofficial body, or a group tainted with evidence of bias and preconception. Precisely the opposite was true. The members of the Commission were chosen by the President of the United States. They included not one single person with any previous connection with the sexual materials industry. Three members of the Commission, on the other hand, had continuing and prominent association with groups organized for the purpose of repressing explicit sexual materials. The Chairman of the Commission was the Dean of the University of Minnesota Law School. The Vice-Chairman was the Director of the University of Michigan library. The other Commissioners included the Chief Judge of the Juvenile Court of Connecticut; the Attorney General of California; three clergymen; two psychiatrists specializing in children and youth – one associated with the Menninger Foundation and the other the Chairman of the Department of Psychiatry at the University of North Carolina; three sociologists – two from major universities (one the Chairman of his department) and the other the Director of Social Research for the Columbia Broadcasting System; professors of film art and English; the president of a major news distribution agency; the Executive Vice President of Pocket Books, Inc.; and the Deputy Attorney of the Motion Picture Association of the United States. Two members of the Commission were women.

Constitutional law, more than any other branch of law, owes an obligation to respect truth, It is inconceivable that any body seeking the truth about allegedly "obscene" materials could be satisfied with its efforts while it *totally ignored* the most comprehensive and impartial existing

collection of scientific knowledge on the subject. The Court is not required to accept the Commission's findings as either accurate or relevant. What is required is that the Court *consider* these findings, which on their face directly contradict the essential factual assumptions which expressly underlie the Court's decisions.

II.

THE PROVISIONS OF GEORGIA CODE 26-2101 AS WRITTEN AND APPLIED TO PETITIONERS HEREIN ARE REPUGNANT TO THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN PARTICULAR THE CONSTITUTIONALLY PERMISSIVE STRICT STANDARDS LAID DOWN BY THIS COURT IN *MILLER V. CALIFORNIA*, 413 U.S. 15.

On June 21, 1973, the United States Supreme Court announced its holdings in five (5) cases submitted after argument which has forever changed the operative obscenity law.

The cases to which we make reference are as follows:

A. *Miller v. State of California*, No. 70-73, 413 U.S. 15,

B. *Paris Adult Theatre I, et al v. Slaton*, No. 71-1051, 413, U.S. 49,

C. *U.S.A. v. Orito*, No. 70-69, 413 U.S. 139,

D. *Kaplan v. State of California*, No. 71-1422, 413 U.S. 115,

E. *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, et al.*, No. 70-2, 413 U.S. 123,

Predicated on the foregoing decisions, this Court on June 25, 1973, by summary action and/or *per curiam* decisions vacated sixty (60) other obscenity cases on its docket in which no prior action had been taken. For a summary review of the cases to which we make reference herein, please note, 413 U.S. 902 et. seq.

This Court when it returned in October of 1973 for its new term continued the practice it started on June 25, 1973 of vacating and remanding back to the lower courts cases for obscenity law violations both Federal and State, Civil and Criminal. All of the vacated cases, without exception, proceeded under the *Roth-Memoirs* formulation and included one, *Cote v. U.S.A.*, No. 71-1120, 413 U.S. 915, wherein the defendant plead guilty and thereafter challenged the constitutionality of the statute on appeal.

On October 23, 1973 this Court vacated and remanded back to the Tenth Circuit the judgment in the case of *Harding v. U.S.*, Doc. No. 72-1646, 42 L.W. 3241. In the *Harding* case the Defendant conceded the obscenity of the material and challenged only the constitutionality of the law. All cases were, as previously stated, vacated and remanded for disposition by the lower courts.

After the decision of this Court in *Paris Adult Theatre I, et al v. Slaton*, counsel filed on July 16, 1973 a *Petition for*

Rehearing which petition was denied by this Court on October 9, 1973. (See 42 L.W. 3200). Among the grounds set forth by Counsel to ask this Court to reconsider or clarify its ruling in *Paris Adult Theatre I, et al* was as follows: "The vacation of the Judgment in this case and the Remand to the Georgia Supreme Court for 'further proceedings' leaves unconstitutionally vague what the duty is that is imposed upon the appellate court with regard to 'further proceedings'."

The effect of the court's decisions on the obscenity cases June 21 and 25, 1973 have caused substantial conflicts in both Federal and State jurisdictions as to what in fact this court has done in regard to pre-*Miller* conduct. Approximately eighteen (18) statutes have been ruled upon by appellate courts and Federal obscenity statutes as well as a state statute have been considered by eight (8) circuit courts of appeal and almost without exception each opinion is a shade different than the other and in some instances are diametrically opposed to one another. The Louisiana Supreme Court in the case of *Gulf States Theatres of Louisiana, et al, v. Richardson, et al* on remand concluded that what the U.S. Supreme Court had done is say that the *Roth-Memoirs* standards employed in the cases before it were unconstitutionally vague and for this reason set down a new constitutional standard. Thus the Supreme Court of the State of Louisiana held its obscenity law unconstitutional and went on to state that it was not the task of the judiciary to authoritatively construe or rewrite legislation and that it was the function of the Legislature. (A copy of the Decision of the Supreme Court of Louisiana as well as companion decisions in two (2) other cases entitled *State v. Shreveport News Agency, Inc.* and *State v. Richard Lee McNutt* are attached hereto in Appendix "D".)

The State of Indiana on remand of cases of *Mohney v. State* and *Stroud v. State* in the U.S. Supreme Court held that the effect of the U.S. Supreme Court's decision was to say that the *Roth-Memoirs* formulation for determining obscenity was unconstitutionally vague and they thus held that their state statutes were unconstitutionally vague. (See *Mohney v. State*, 300 N.E.2d 66 and *Stroud v. State*, 300 N.E.2d 100.)

The following represents a list of cases wherein appellate courts and/or *nisi pris* courts of record have ruled or reviewed cases involving pre-*Miller* conduct but in post-*Miller* decisions.

A. *STATE APPELLATE COURTS OR FEDERAL THREE JUDGE COURTS INVOLVING STATE OBSCENITY LAWS*

ALABAMA

United Artists Corporation vs.
E.L. Wrights, Jr., Inc., etc.

Civil Action # 4208-N
U.S.D.C. – M.D. of Alabama
Northern Division
(1-5-74)
(See Appendix D)

Chester McKinney vs. City of Birmingham

#509 – #516
Alabama Court of Appeals
(10-30-73)
(See Appendix D)

Harlow vs. City of Birmingham

#577, #582, #585
Alabama Court of Criminal Appeals
(1-15-74)
(See Appendix D)

CALIFORNIA

People of the State of California vs. Enskat, 109 Cal Rptr 433

California Court of Appeals
2nd Appellate Dist.
Div. 5

DISTRICT OF COLUMBIA

Kaplan vs. U.S., No. 5452
District of Columbia Court of Appeals
(11-21-73)
(See Appendix D)

FLORIDA

Rhodes vs. State

Supreme Court of Florida
Opinion iled Sept. 19, 1973
(See Appendix D)

Papp vs. State, 281 So 2d 600 (1973)

GEORGIA

Slaton, et al vs. Paris Adult Theatre

Supreme Court of Georgia
(10-30-73)
(See Appendix B)

Jenkins vs. The State No. 27692,
199 S.E.2d 183 (7-2-73)
Cert. granted 12-10-73 #73-557)

INDIANA

Mohney vs. State, 300 N.E.2d 66 (1973)
Stroud vs. State, 300 N.E.2d 100 (1973)

IOWA

State vs. Edward J. Wedelstedt,
David Cory & Wayne Davis
258 Supreme Court of Iowa (12-19-73)
1-56081
(See Appendix D)

State vs. Dale Lavin,
Edward J. Wedelstedt, etc.

Nos. IMI-242; IMI-319 In the Iowa District Court
IMI-396; IMI-397 In And For Linn County
IM2-230;IM2-231 August 13, 1973

LOUISIANA

State vs. Shreveport News Agency, Inc.
No. 53,985

Supreme Court of La.
(12-3-73)
(See Appendix D)

State vs. Richard Lee McNutt
No. 52,489

Supreme Court of La.
(12-3-73)
(See Appendix D)

Gulf States Theatres of La., et al
vs. John Richardson and
George W. D'Artois

No. 54,044
Supreme Court of La.
(12-3-73)
(See Appendix D)

MASSACHUSETTS

Commonwealth v. Claflin,
298 N.E. 2d 888

Appeals Court of Mass.
Decided July 11, 1973

MISSOURI

City of Kansas City vs. O'Connor #57266
City of Kansas City vs. McNellis#58132
City of Kansas City vs. Reed #58133

Supreme Court of Missouri
(10 8-73)

State, ex rel. Wampler vs.
Dick and Edna Bird, etc.

No. 57240
Supreme Court of Missouri
(10-8-73)
(See Appendix D)

NEW JERSEY

Hamar Theatres vs. Cryan, et al
No. 472-73
U.S.D.C. – District of New Jersey

U.S.D.C. - District of New Juersey
(7-26-73)
Petition for Cert. pending #73-711
(See Appendix D)

NEW YORK

People of the State of New York
vs. Jim Bucklay and Al Goldstein

No. 297
State of New York Court of Appeals
Decided: December 28, 1973

People of the State of New York
vs. Saul Heller

No. 184
State of New York Court of Appeals
Decided: December 28, 1973

Redlich v. Capri Cinema
347 N.Y. Supp. 2d, 811

NORTH DAKOTA

Jerry McCright, et al vs.
Allen I. Olson, et al

Civil Action #4849
U.S.D.C.
District of North Dakota,
Southeastern Div.
(12-17-73)
(See Appendix D)

OHIO

State, ex rel Keating vs. Vixen,
35 Ohio St.2d 215 (1973)

State, ex rel. Sensenbrenner vs. Adult Book Store,
301 N.E.2d 695 (1973)

SOUTH CAROLINA

State vs. Watkins

Supreme Court of South Carolina
No. 19727
(11-26-73)
(See Appendix D)

WISCONSIN

State of Wisconsin, ex rel. Joseph Chobot vs. Circuit Court for Milwaukee City.

State No. 179
(12-10-73)
(See Appendix D)

TENNESSEE

Bijou Theatre of Knoxville, Inc., et al vs. State of Tennessee

No. 243
Court of Criminal Appeals of Tenn.
(11-29-73)

Mitchum v. Tennessee

No. 10 Shelby County
Court of Criminal Appeals of Tenn.
(Nov. 20, 1973)
(See Appendix D)

Grigsby vs. Tennessee

No. 167 Sullivan County
Court of Criminal Appeals of Tenn.
(Oct. 9, 1973)

WASHINGTON

State vs. J-R Distributors, Inc.
512 P2d 1049 (July 27, 1973)

Supreme Court of Washington

B. FEDERAL "CIRCUIT COURTS"

FIRST CIRCUIT

U.S.A. vs. One Reel of Film,
481 F2d 206 (July 16, 1973)

SECOND CIRCUIT

U.S.A. v. Cangiano, et al.,
(12-27-73)

FOURTH CIRCUIT

Brown vs. U.S.A.

Petition for Writ of Certiorari
pending #73-788

FIFTH CIRCUIT

U.S.A. vs. Thevis & Peachtree News,
484 F2d 1149 (9-12-73)

Petition Pending #73-1075
#73-1091

(See Appendix D)

U.S.A. vs. Cote,
485 F2d 574 (10-11-73)

Petition for Certiorari pending
(See Appendix D)

SIXTH CIRCUIT

Southeastern Promotions, Ltd., vs.
Conrad, et al, 486 F2d 894 (1973)

Rehearing denied October 30, 1973

SEVENTH CIRCUIT

U.S.A. vs. Sians,
No. 71-1346 (July 5, 1973)

Appeal from the U.S.D.C. – N.D. of Illinois –
Western Div.

NINTH CIRCUIT

U.S.A. vs. Henson No. 73-2063
Opinion filed October 5, 1973

U.S. vs. Hamling, 481 F2d 307 (1973)
Rehearing denied (8-23-73)
Certiorari granted Jan. 14, 1974, 42 LW

TENTH CIRCUIT

U.S.A. vs. Friedman & Peachtree
Nat'l Distributors

No. 72-1143 and 1144
(12-11-73)

C. FEDERAL NISI PRIUS DECISIONS

CALIFORNIA

U.S.A. vs. Lang, 361 F.Supp. 380
(C D Calif 1973)

RHODE ISLAND

U.S.A. vs. Joseph Vinacco #7971
U.S.A. vs. Richard Shappy#7972
U.S.A. vs. Guarino, et al#7968
U.S.A. vs. Coleman #7970

TENNESSEE

U.S.A. vs. Carter — Criminal CR 72-207
U.S.D.C.-W.D. of Tenn.
Western Div. (12-12-73)

(See Appendix D)

It is the position of Petitioners that the State of Georgia obscenity statute was and is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 [1957].

When dealing with a claim of void for vagueness in the penumbra of the *First Amendment*, we must be mindful of the decision of the United States Supreme Court in *U.S.A. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963), wherein the Court stated:

> "In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v, [State of] Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 [9 L.Ed.2d 405]."

To support our contention herein, we should like to briefly review the written opinions identified herein as cases (A) through (E) as will support our position.

Mr. Chief Justice Burger, in *Miller v. California, supra,* at page 4927, conceding the failure of the Court to set forth precise constitituional standards, writes in part as follows:

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States[police power. See, e.g. Redrup v. New York, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication [footnote omitted].' Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 704-705 (1968) (Harlan, J., concurring and dissenting)."

In a footnote 3 of the majority opinion appended to the foregoing quote, we read:

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup 'policy.' See Walker v. Ohio, 398 U.S. 434, 435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us."

The majority opinion further points out:

"The case we now review was tried on the theory that the California Penal Code §311 approximately incorporated the three-stage Memoirs test, supra. But now the Memoirs test *has been abandoned* as unworkable by its author and *no member of the Court today supports the Memoirs formulation.*" (Emphasis supplied.)

After recognizing the failure of any constitutional definiation of what is obscene accepted by a majority of the Court, the opinion of Mr. Chief Justice Burger goes on to state the singular unvarying factor which represents a consensus of prior decisions of the Court:

"This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment, Kois v. Wisconsin, 408 U.S. 229

(1972). United States v. Reidel, 402 U.S. 351, 354 (1972). Roth v. United States, 354 U.S. 476, 485 (1957). 'The First and Fourteenth Amendments have never been treated as absolute (footnote omitted).' Breard v. Alexandria, supra, 341 U.S. 622 at 642 (1951), and case cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, supra 343 U.S. at 502 (1952)."

Thereupon the Court goes on to state what it now promulgates as a new constitutional standard for State cases (and in *U.S. v. Orito, supra,* and *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, supra* [see footnote] made potentially applicable to a federal obscenity case, after legislative enactment or authoritative judicial construction by the United States Supreme Court):

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

The opinion of Mr. Chief Justice Burger speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future

legislative enactment or authoritative judicial construction (if possible) stated at page 3164:

> 'Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

It is important to note the context in which the Court was called upon to define the press materials that a State could permissibly regulate, and, in *Miller v. California, supra,* the new constitutional gloss placed on obscenity-pornography cases must be considered in light of the aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive sexually explicit materials. See 413 U.S., page 18 wherein appears the following caveat:

> "This case involves the application of a State[s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S.

629, 637-643 (1968). Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 690 (1968). Redrup v. New York, 386 U.S. 767, 769 (1967). Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C.J. concurring); United States v. Reidel, 402 U.S. 351, 360-362 (Marshall, J., concurring) (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Breard v. Alexandria, 341 U.S. 662, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

See also footnote 2 in further explanation.

Miller v. California, supra, is the key case in which the United States Supreme Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the *First Amendment.* It is obvious that the Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when the Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by the Court in *Miller v. California, supra,* as far as specifically designating prohibited material is concerned. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and the Court confined the permissible scope

of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

The Court discussed the press materials to which the regulation would be confined, the press materials which would constitute the offense and the guidelines necessary to forewarn a potential wrong doer. The element of the three part test and the key guideline for the trier of fact in the new tripartite test clearly indicate the facial invalidity of the federal statute where we read:

> "(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct in a patently offensive way, sexual conduct that is specifically defined by state law . . . If the state law that regulates obscene material is thus limited as written and construed, the material may be regulated."

Clearly, if the provisions of the Statute are to be limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the legislature, or if specific hard core sexual conduct must be read into the statute by authoritative judicial construction, the present Statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Georgia Legislature to create legislation anew adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the courts. Before the Appellate courts can so construe, there must exist a constitutionally permissible statute with which to work. The present Georgia statute can not be authoritatively

construed to meet the *Miller* test of specificity. It was one thing for this court to suggest constitutionally permissible limits; yet, it is another to add to a statute by authoritative judicial construction "specifically defined sexual conduct" never previously mentioned or defined by the State of Georgia Supreme Court. This Court said:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

In other words, it is one thing to "elaborate" on the *Roth* test as did the *Memoirs* court without judicially legislating. It is another to "create anew and engraft the *Miller* test" onto the present statutes. Any case, criminal or civil, pending trial or appellate review based on Pre-Miller conduct, should be set aside where there has not been given the "fair warning" suggested by this Court in *Miller*. The "fair warning" concept of a specifically defined statute prohibiting or punishing public obscenity would comport with Fifth and Sixth Amendment considerations as well as the all important First Amendment. Any case, criminal or civil pending trial or appellate review based on Pre-Miller conduct, in a jurisdiction where as, in the case at bar, there had been no authoritative judicial construction specifically defining the punitive patently offensive hard-core sexual conduct prior to the date on which the dissemination of the sexual materials occurred should be granted certiorari by this court and revised. It is clear that the present judicial construction by the Supreme courts of Georgia incorporating the *Miller* test must fail at this juncture

because the statute as written fails to give any person fair notice that criminal or civil liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

The United States Supreme Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction in an effort to prevent the legislature having to take the trouble to enact a new statute, punishes one for conduct that was not criminal at the time that it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Georgia statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held punitively responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

The apparent constitutionally impermissible judicial construction of the questioned Georgia statute, if this Court takes no action, will become retroactively expanded by judicial construction to the detriment of the ordinary adult in our society. Facially, the statute is void for vagueness. The man in the street looking at this statute, however, will be lulled into a false sense of security because he has no reason to suspect that conduct clearly not described in the statute

and outside of the scope of the statute as written could be retroactively brought within the statute by an act of judicial construction, depending on the judicial forum. A deprivation of the right of fair warning results from an unforeseeable and retroactive judicial expansion of vague and imprecise statutory language, which is what Georgia will seek to convince this Court that it should do.

This Court's failure to strike down the applicable statutes as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retoractively, and which will operate precisely like an *ex post facto* law. All those actions done before the United States Supreme Court[s announcing of new standards and which were done innocently under old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the *Constitution* from passing laws of this nature and surely this Court and the various appellate and trial courts must be barred by the due process clause from achieving precisely the same results by judicial construction.

It is interesting to note that in only one case, *Kaplan v. California, supra,* did this Court affirmatively agree that the publication ("Suite 69") was obscene under the *Roth – Memoirs* formulation, which was an express part of the California Penal Code §311 (. at page 118) but, notwithstanding the concurrence of the majority of the United States Supreme Court with the independent constitutional judgment of the California appellate courts on review that the said publication was obscene, and notwithstanding the further finding at page 122 which reads:

"On the record in this case, the prosecution's evidence was sufficient, as a matter of federal constitutional law to support Petitioner's conviction."

The case was also vacated and remanded.

We suggest that the action of this Court in vacating and remanding Kaplan, was an express acknowledgement of the patent unconstitutionality of the California Penal Statute. This Court sent the matter back to the appellate court for disposition consistent with its decisions announced on June 21, 1973, including the possibility of allowing the appellate court to make, if it could, a judicial construction to be applied prospectively. It is clear that the California appellate court is being given an opportunity to establish, if it can consistent with its constitutional authority, an authoritative judicial construction of the regulating State statute which would implement the newly announced permissible constitutional standards for judging proscribable obscenity, including "hard core" sexual conduct that is specifically defined by State law. (See examples suggested by the Court on page 25.)

It is clear, then, that in the event of such a ruling, Mr. Kaplan should not be held accountable.

The Supreme Court has stated:

"A ruling which is purely prospective does not apply even to the parties before the Court." Linkletter v. Walker, 381 U.S. 618 (1965) at page 621.

See also:

England v. Board of Medical Examiners, 375 U.S. 411;

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358.

In the original *Paris Adult Theatre* case this Court at 413 U.S. page 69 stated:

> "In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law as written or are authoritatively interpreted by the Georgia Courts, meets the First Amendment standards set forth in Miller vs. California, ante, at 23-25."

Whereupon the Court went on to say that the "Judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this Opinion and *Miller vs. California*, supra. See *United States vs. Twelve 20Ft. Reels of Film*, post at 130 n. 7."

On remand the Georgia Supreme Court in the decision in this case now being appealed from stated in part as follows:

> "In the past, this Court has defined and described conduct as obscene within the meaning of the Georgia statute in substantially the same language as that suggested by the Supreme Court in *Miller*. In *Evans Theatre Corp. vs. Slaton*, 277 Ga. 377, 379 [180 SE2d 712] [1971], we dealth with depictions of 'acts of sexual intercourse, natural, unnatural, bizarre, and violent.' In Walter vs. Slaton, 227 Ga. 676, 680 [182 SE2d 464] [1971], the films were of 'actual sexual activity, both natural and unnatural,' which included sexual intercourse, fellatio and cunninglingus. For a similar description of obscene material, see *1024 Peachtree Corporation vs. Slaton*, 228 Ga. 102 [184 SE2d 145] [1971]."

The case of *1024 Peachtree Corporation vs. Slaton* was a civil case and not a criminal case wherein the State sought to enjoin a corporation which operated the motion picture theatre from publicly showing an allegedly obscene film. The Court specifically stated that the film was found to be sexual conduct "graphically demonstrated in the close-up camera shots and scenes of Sandra, while completely nude, having sexual intercourse with nude men on numerous occasions throughout the entire film, and the cunnilingal act of Phil on Sandra, and Sandra masturbating." The Court went on to say "practically from the first frame, the film is dominated by nudity and sex, and we are unable to perceive how its appeal could be to anything but the prurient interest of its viewers." Whereupon the Court in its ruling stated:

> "Although we regard 'Sandra' as hard core pornography, the ruling we review here is not an Order finding the film obscene, but merely a finding of probable cause."

Thus it would appear then the 1024 Peachtree Corporation which the Supreme Court of Georgia cites for the proposition that they have specifically defined the kinds of conduct prohibited, this case did not involve the question of obscenity on final determination and it is clear that the Georgia Supreme Court only applied prurient interest test and none of the other factors to be involved.

Further as this case is reported in the West Digest System not one of the headnotes classifies this case as an obscenity case so that some one seeking to find out what judicial constructions Georgia had placed upon its obscenity law would probably not come across this particular citation. The Supreme Court of Georgia further indicated as set forth above that they had made a judicial determination of specifically defined hard-core patently offensive sexual conduct in *Evans Theatre Corp. v. Slaton.* The film involved in *Evans Theatre Corp. et al, v. Slaton* was entitled "I Am Curious (Yellow)". The Court says about the film "I Am Curious (Yellow)" that it relates to a young woman and her sex partner shown completely nude and during the course of the film "they engage in numerous acts of sexual intercourse, natural, unnatural, bizarre and violent. In a dream fantasy the young woman murders and castrates her sex partner. All of these scenes are explicit."

There were no actual depictions of sexual intercourse natural or unnatural in the movie "I Am Curious (Yellow)" a fact which can be attested to by the members of this court who were sitting on the court at the time the Grove Press case out of Maryland came before it. No one would seriously challenge the movie "I Am Curious (Yellow)" today as being obscene in any urban areas of this country including those found in the States of Maine or Mississippi, Las Vegas or New York City.

The only question presented regarding the constitutionality of Georgia Code *26-2101* in the *Evans Theatre Corp.* case was whether or not it (the statute) could be applied to the exhibition of obscene films to consenting adults. (See 227 Ga. 378). There was no request for construction of the statute with regard to determining the constitutionality of standards for assessing obscenity. The

Supreme Court, after the fact, now suggests that the authoritative judicial construction of 26-2101 has existed since the *Evans Theatre* case.

In the last case to be cited by the Georgia Supreme Court for the proposition that they had previously "authoritatively construed" the statute, we have *Walter v. Slaton,* 227 Ga. 676. No question was present in that case regarding constitutionality of the law (26-2101) or the standards to be applied or the issue that 26-21-1 is void for vagueness. No ruling was made by the court which authoritatively construed the statute in spite of the Georgia Supreme Court's comment in the *Paris Adult Theatre* case of October 30, 1973, that it had heretofore so construed the statute.

It may well be that the material as described in *Walter v. Slaton,* supra, might qualify as patently offensive depictions of hard-core sexual conduct but that conduct is not specifically defined by State statute. The Georgia Supreme Court by its majority opinion has also held that the movie "Carnal Knowledge" subject of an appeal pending in this court in case No. 73-557 was also hard-core pornography, yet, in that movie there was not one act of explicit sexual intercourse *fellatio* or *cunnilingual* activity. Too often courts are prone to call material "hard-core pornography" where it is simulated conduct versus actual conduct or where the conduct may be suggested and not consummated. This would be somewhat analagous to Indians being shot off their horses in Western movies and who roll over and play dead when we all know that they are not really dead but going through simulated motions.

To illustrate my point, I should briefly like to discuss some cases wherein this Court has held material not to be

obscene that was described by the *nisi prius* court or appellate courts as "hard-core pornography"

1. *Aday vs. U.S.*, 388 U.S. 447 (1967) paperback book entitled "Sex Life of a Cop". In the case *U.S.A. vs. West Coast News Company, Inc.*, 357 F2d 855 (1966) at pages 857 and 858 the Sixth Circuit characterized the material as "hard-core".

2. *Quantity of Books vs. Kansas*, 388 U.S. 452 (1967). Publications were paperback books entitled as follows: "Sin Hooked Bayou Sinners", "Lust Hungry", "Shame Shop". "Flesh Pot", "Sinner Seance", "Passion Priestess", "Penthouse Pagans", "Shame Market", "Sin Warden", "Flesh Avenger".

The Supreme Court of Kansas in *State of Kansas vs. A Quanity of Books*, 416 P2d 703 (1966) called these publications "hard-core pornography."

3. *Shackman vs. California*, 388 U.S. 454 (1967). The description of the films before the court is reported at 258 F.Supp. 983 (1966) where the court said, "The court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard-core sense because they come within the reasonable purview and ambit of both the federal judicial definition of obscenity and hard-core pornography.

4. *Robert-Arthur Management Corp. vs. Tennessee*, 389 U.S. 578 (1968). Motion picture film entitled "Mondo Freudo".

The Tennessee Supreme Court in *Robert-Arthur Management Corp. v. State of Tennessee,* 414 S.W.2d 638 (1967) stated that this material was hard-core pornography.

5. *Walker vs. State of Ohio,* 398 U.S. 434 (1970) Publications involved were "Lurid Sinner", "Sin Crop", "Nifties, Vol. 195", "Peek-a-Boo, No. 4". The Fifth Appellate District of Ohio in *Walker v. State of Ohio,* No. 3464 (August 1969) held that, "it is our opinion and finding that if the material contained in the above and especially "Lurid Sinner' is not 'hard-core pornography' then that phrase is incapable of definition".

In the Paris Adult Theatre decision by the Georgia Supreme Court on October 30, 1973 they stated:

> "We, therefore, conclude that the Georgia statute has been specifically delineated in a manner consistent with the new *Miller* standards."

If the *Miller* standards are to mean anything consistent with one's constitutional rights of fair warning and notice, the Georgia Supreme Court has fumbled the ball and failed in the task assigned to it by this Court in 413 U.S. 49.

III.

THE TWO MOTION PICTURE FILMS INVOLVED IN THE CASE ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND THUS ARE PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS

THE SAME WAS APPLICABLE DURING THE PERIOD OF TIME COVERED BY THE ALLEGED CONDUCT CHARGED AGAINST PETITIONERS.

The non hard-core motion piture films involved herein are comparable to those held protected by this Court in the following case:

A. *Bloss vs. Michigan,* 402 U.S. 938 [1971]

B. *Cain vs. Kentucky,* 397 U.S. 319 [1970]

C. *Robert Arthur Management Corp. vs. Tennessee,* 389 U.S. 578 [1968]

D. *IM Amusement Corporation vs. Ohio,* 389 U.S. 573 [1968]

E. *Schackman vs. California,* 388 U.S. 454 [1967]

F. *Ratner vs. California,* 388 U.S. 442 [1967]

G. *Cobert vs. New York,* 388 U.S. 443 [1967]

This Court in *Miller vs. California,* supra, concedes that it must be the final arbitor and review each obscenity case that comes before it and cited with approval in *Miller* from *Roth* the following:

> "Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."

Ever since the United States Supreme Court determined, in *Roth v. United States,* supra, that the *First*

Amendment did not protect obscene materials, it has necessarily assumed the responsibility of devising formulae for recognizing the "dim and uncertain", *Bantam Books v. Sullivan*, 372 U.S. 58, 60 (1963), which separates obscenity from protected expression. That the Court, in its attempts to separate obscenity from protected expression, has had its difficulties in articulating clear standards for prosecutors, courts, and citizens to follow is readily apparent from the multitude of fragmented opinions, which have emanated from the Court in lieu of clear majority decisions; *e.g.*, *Memoirs v. Massachusetts*, 383 U.S. 143 (1966); *Ginzburg v. United States, supra; Jacobellis v. Ohio*, 378 U.S. 184 (1964), and the numerous others without opinion which have characterized the Court's efforts in this sphere.

This Court on June 21, 1973, long after the time of the alleged offense, has articulated standards for the future which they suggest will pass constitutional muster in *Miller v. California* and the other cases decided on that day. The majority of this Court attempted to find a solution to the imprecision of the various standards relied upon by the members of the Court prior tothis time and set out to fashion such new standards.

The motion picture films involved herein should be judged, if at all, by the status of the law on the standards being applied by the Courts as of the time of the conduct complained of (Dec. 28, 1970). Briefly, the law which was being applied at that time by this Court permitted a certain type of judicial review which has been characterized as the Redrup approach, and we shall address ourselves to the status of the law as it was for the purposes of this part of our argument.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after Roth, but it is significant to note a trend developed, which found

fruition in 1967 in the case of *Redrup v. New York, supra,*. For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the *First Amendment.* rights by Congress or by the State to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

This Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in *Ginzburg v. United States,* supra, that no obscenity confiction or suppression could follow consistent with the *First Amendment.* Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.* The cases reversed are: *Austin v. Kentucky,* 386 U.S. 767 (1967); *Gent v. Arkansas,* 386 U.S. 767 (1967); *Ratner v. California,* 388 U.S. 422 (1967); *Cobert v. New York,* 388 U.S. 443 (1967); *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New*

York, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Deykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina, supra, Wiener v. California, supra; Hartstein v. Missouri*, 404 U.S. 988, 30 L.Ed. 2d 539 (1971).

While *Roth* attempted to provide analytic tools for the separation of protected from unprotected expression,[11] a majority of the Court has yet to agree on a precise test for determining obscenty.[12]

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[11] But see Stewart, J., dissenting in *Ginzburg v. United States, supra:* "It is not accurate to say that the *Roth* opinion 'fashioned standards' for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved (354 U.S. at 481, n. 8). And in no subsequent case has a majority of the Court been able to agree on any such 'standards'."

[12] Probably the verbal formula closest to consensus so far appeared in *Memoirs v. Massachusetts, supra:* "... three

Admitting that the *Roth* Formula "is not perfect", *Jacobellis v. Ohio, supra,* raises "difficult problems", *Ibid.,* and is afflicted with "perhaps inherent residual vagueness", *Ginzburg v. United States,* supra, the Court's decision to adhere to *Roth* – "that we should try to live with it – at least until a more satisfactory definition is evolved", *Jacobellis v. Ohio, supra,* at 200 – was an interim accommodation to the Court's inability to reach a real consensus on the subject. Subsequent experience with the problem has produced no greater unanimity. Two Justices, Black and Douglas, who dissented in *Roth,* had never accepted the principle that obscenity may be regulated without violence to the *First Amendment* (see E.g., *Ginzburg v. United States, supra* at 476 [Black, J. dissenting] and at 482 [Douglas, J., Dissenting].

A third, Justice Stewart, held the view that obscenity regulation may be constitutional only if applied to "hard-core pornography."[13] Yet a fourth, Justice Harlan, had, when on

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(Footnote 12 continued)
elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. 413, 418 (1966).

A preliminary, rather unilluminating definition of hardcore pornography, "I know it when I see it", *Jacobellis v. Ohio, supra* at 197 (Stewart, J., concurring) has been supplemented by Justice Stewart by the following description "of the kind of thing to which I have reference": "Such materials include photographs, both still and motion picture, with no pretense of artistic value, *graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism,* and sometimes involving several participants in scenes of orgy-like character . . ." *Ginzburg v. United States, supra* at 499, n. 3 (Stewart, J., dissenting). (Emphasis added.)

the bench, adopted the "hard-core pornography" test as to federal prosecutions, but had urged more latitude for conviction in state criminal cases. *Jacobellis v. Ohio, supra* at 204 (Harlan, J., dissenting). Justice Brennan, together with former Chief Justice Warren and former Justice Fortas, had adhered to the three-pronged enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, (1966), *set out in full in Ginzburg v. United States, supra* at 476 (Black, J., dissenting) and at 482 (Douglas, J., dissenting), a "not dissimilar standard" from the "hard-core pornography" test. The *per curiam* opinion in *Redrup v. New York* so equates the hard-core pornography test and the three-pronged *Memoirs* test. 386 U.S. 767, 770-771 (1967). And there are indications that three (3) of the newer justices, Chief Justice Burger, and Justice Blackmun, *Ibid.*, follow Justice Harlan's views and that Justice Marshall (see majority opinion in Marshal, J., in *Stanley v. Georgia,* 394 U.S. 557 (1969)) has adopted Justice Brennan's conception of *First Amendment* interpretation in this sphere.

Moreover, a majority of the Court has united to underscore the irrelevancy, for constitutional purposes of the claim that material is "arguably devoid of any ideological content", for "the line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all", *Stanley v. Georgia, supra,* citing with approval, *Winters v. New York,* 333 U.S. 507 (1948).

Findings of obscenity have been reversed as to press materials devoted entirely to explicitedly depicting or describing the sexual activities of its characters, including

detailed and vernacular descriptions reaching the ultimate in explicitness, of heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity; *e.g., Memoirs v. Massachusetts,* supra, ("Fanny Hill"); *Aday v. United States, supra* ("Sex Life of a Cop", see description of book at 357 F.2d 855); *Corinth Publications v. Wesberry, supra,* ("Sin Whisper", see description of book at 146 S.E. 2d 764); *Mazes v. Ohio,* supra, ("Orgy Club"); *Hoyt v. Minnesota, supra,* ("The Way of a Man With a Maid", "Lady Susan's Cruise Lover", and three other books); and *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to motion picture films, the Court has reversed findings of obscentity as to films which depict totally nude women, films which show nude or partially nude woman and men engaged in sexual gyrations, simulated intercourse, and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Moreover, the Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom., Pinkus v. California.*

Thus, the only conclusion which could have been rationally extrapolated from these decisions without opinion is that any publication containing exclusively pictorial material which depicts, graphically and exclusively, nudes in

sexual poses and movement, even without presence of social importance, is constitutionally protected. Should the pictures show graphic depiction of sexual acts accompanied by substantial test material, then requisite social value is present and thus, the material would not be obscene.

The motion picture films at bar when considered as a whole, and as judged against press materials of similar or more explicit sexual content – heretofore, determined by this Court, not to be obscene in the constitutional sense, should thus be held protected, and the decision of the Supreme Court of Georgia should be summarily reversed.

IV.

THE VARIOUS UNITED STATES SUPRME COURT RULINGS ON OBSCENITY PROMULGATED ON JUNE 21 AND JUNE 25, 1973, EFFECTING A SUBSTANTIAL DECISIONAL CHANGED IN THE APPLICATION OF CONSTITUTIONAL PRINCIPLES, CANNOT BE APPLIED RETROACTIVELY TO PETITIONERS IN THE CASE AT BAR FOR CONDUCT OCCURRING PRIOR TO THOSE DECISIONS, AND, THE APPLICATION OF THE STATUTE TO SAID PETITIONERS IS VOID AS EX POST FACTO LEGISLATION BY VIRTUE OF ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The newly announced decisions of the Supreme Court in which reference has been made herein represented "a clear

break with the past," in the words of Mr. Justice Stewart in *Desist v. United States,* 394 U.S. 244, 248 (1969).

On June 25, 1973 in a matter coming out of the Fifth and Second Circuits, the United States Supreme Court updated and restated its concept of retrospective and prospective application of decisional law making.

In the case of *Gosa v. Mayden,* et al,413 U.S. ____, (1973), question of the application of the new constitutional concept is discussed in detail, as stated in part at page

> "Rather, the prophylactic rule there formulated 'created a protective umbrella serving to enhance' a newly recognized constitutional principle. Michigan v. Payne, ____U.S.____ (1973). (41 LW 4671). That recognition and effect are given to a theretofore unrecognized and uneffectuated constitutional principle does not, of course, automatically mandate retroactivity. In Williams v. U.S.A., 401 U.S. 646, 651 (1971) Mr. Justice White made it clear citing Linkletter v. Walker, 381 U.S. 618 (1965), that the Court has 'firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored."

See the extensive discussion of this subject in the following cases:

A. *Linkletter v. Walker,* Supra;

B. *Stovall v. Denno,* 388 U.S. 293, 297 (1967);

C. *Desist v. United States,* supra;

D. *Robinson v. Neil,* 409 U.S. 505 (1973);

E. *Michigan v. Payne,* 412 U.S. 47 (1973).

See also:

"Comment: Retroactive or merely prospective operation of new rule adopted by Court in overruling precedent – federal cases." 14 LEd 2d 992.

"Prospective Overruling and Retroactive Application in the Federal Courts." 71 Yale L.J. 907 (1962).

As has been stated the United States Supreme Court on June 21 and June 25, 1973 vacated and remanded approximately sixty-eight (68) obscenity cases to the lower courts for final disposition. It is clear that the action of this Court in this regard in vacating and remanding the said sixty-eight (68) cases approximately ten (10) others have been dealt with by this Court during the October 1973 term in the same way. The rationale of *Miller v. California,* supra (see *U.S. v. 12-200 Ft. Reels of Film,* supra, n. 7) is to apply only prospectively as the language of those decisions makes clear, because there was no constitutionally valid test pertaining to obscenity agreed to by a majority of the Court that would give fair warning to a defendant that his proposed course of conduct would subject him to possible criminal prosecution, and thus said vague laws were violative of the *Fifth, Sixth and Fourteenth Amendment* rights of such defendants. A federal judge in the U.S. District Court for the Central District of California (Judge Pregerson) on Wednesday, July 11, 1973 dismissed a federal indictment on a Motion to Dismiss for this very reason. The case is styled as *U.S. v. Lang,* 361 F. Supp. 380 (1973), U.S.D.C. for the Central District of California.

Appellate judges have dismissed indictments and/or informants against persons in Indiana as well as the States of Iowa, Louisiana, North Dakota, New Jersey and California on the basis that the same were brought under a law which is now lacking in specificity according to the Supreme Court decisions and thus unconstitutional as applied to the various defendants before the Court.

- - -

On August 21, 1973, the Supreme Court of Indiana reversed the convictions of the defendants in two cases in which certiorari was granted and the cases remanded on June 25, 1973 by an order identical to the order in this case. The two cases are *Stroud v. Indiana,* 273 N.E.2d 842 (1971) and *Mohney v. Indiana,* 276 N.E.2d 517 (1971) wherein they unanimously held:

> "The main thrust of those opinions so far as applicable to this case is that the statute under which the appellant was convicted is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.
>
> Pursuant to the order and direction of the U.S. Supreme Court we hold the statute involved in this case is unconstitutional on the grounds announced by that Court.

Therefore pursuant to the order of the United States Supreme Court the judgment and conviction of Appellant – Defendant is reversed and remanded to the trial court, and pursuant to the order of the United States Supreme Court, the trial court is directed to discharge the Defendant.

All Justices concur."

The two cases which reversed the convictions are *Stroud v. State*, N.E. 2d 100 1973, and *Mohney v. State*, 300 N.E.2d 66 1973.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *(United States v. Harriss*, 347 U.S. 612, 617.)

The Due Process clause of the *Constitution* requires that a court strike down a criminal statute where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

The United States Supreme Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of law, Ibid., and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453.

See also:

A. *Rabe v. State of Washington,* 405 U.S. 313 (1972);

B. *Wright v. State of Georgia,* 373 U.S. 284 (1963);

C. *Palmer v. City of Euclid,* 402 U.S. 544 (1961);

D. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

If the newly announced constitutional principles promulgated by the United States Supreme Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner in the case at bar for alleged conduct said to be violative of the statute at a time during April 1971, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10.

An *ex post facto* law has been defined by the United States Supreme Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* that it was, when committed." *Calder v. Bull,* 3 Dall 386, 390 (Emphasis supplied).

This Court has said that "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *King v. Missouri,* 107 U.S. 221, 135.

To put this question in better prospective, we should like to discuss the summary of the general principles that would

relate to indictments and/or informations charging violations of State and/or federal laws pending trial or on appeal as of June 21, 1973 for conduct purportedly engaged in prior to that time:

A. BLACKSTONE'S RETROACTIVE THEORY THAT A COURT MERELY DISCOVERS WHAT THE LAW HAS ALWAYS BEEN WAS REJECTED BY THE U.S. SUPREME COURT.

The common law theory of Blackstone was that in a new decision overruling prior decisions or putting a non-judicial gloss on a statutory interpretation the courts merely discivered what the law always was and had been, and therefore did not effect any change in the law, and thus was retroactive. The theoretical basis for this has now been rejected. *Linkletter v. Walker,* supra, at pp. 622-623 (1964); accd. *United States v. Fay,* 333 F.2d 12, 15-16 (2d Cir. 1964), with citations. In *Linkletter* the court, 381 U.S. at 623, said:

> 'Thus the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective."

This statement follows a five-page discussion of what the court calls the history and theory of the Blackstonian rule that "the judge rather than being the creator of the law was but its discoverer" (381 U.S. at 623) as contrasted to the Austin theory that judges do engage in intersitial lawmaking (not rewriting of statutes). In rejecting the Blackstonian theory of automatic retroactivity, the court held (381 U.S. at 627) that there was no distinction to be drawn between

criminal and civil litigation, and specifically cited the criminal income tax evasion case of *James v. United States,* 366 U.S. 213 (1961), as an example of prospective overruling in a criminal case.*

Linkletter, supra, which rejected this Blackstonian theory involves the start of the whole body of case law to determine whether expanding constitutional safeguards in favor of defendants in State criminal trials, i.e. the *Fourth, Fifth* and *Sixth Amendments,* were to be applied retroactively or prospectively. See Annotation, 22 L.Ed. 2d 824-858. The considerations in our case are quite different, but some of the principles as to when constitutional protections are to be applied retroactively may be helpful. In any event, the Blackstonian principle of automatic retroactivity has been explicitly rejected and, in addition, the decision is not retroactive on *ex post facto* and related principles.

B. LACK OF FAIR NOTICE RULE.

The basic rule is that a penal statute is void for vagueness where it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden and proscribed. *Lanzetta v. New Jersey,* supra, at page 453 (1939); *United States, v. Harriss,* 347 U.S. 612, 617 (1954); *Rabe v. Washington,* supra, at page 316 (1972).

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*In *James* the criminal conviction for federal income tax evasion was set aside on the grounds that the taxpayer had a right to rely on the judicial gloss placed on the statute.

This principle is also applicable where the uncertainty of the statute is not clearly revealed until and except by the court's decisions. In *Bouie v. City of Columbia,* supra, at p. 352, the court said:

> "* * *If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta,* or the 'guess at [the statute's] meaning and differ as to its application,' as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

C. ANALYSIS OF THE MILLER DECISION.

Part I of the *Miller* decision traces the history of the obscenity law from *Roth.* It states that "apart from the initial formulation in the *Roth* case, no majority has at any time been able to agree on a standard," (page 22) that the *Memoirs* test was a plurality test only, and that as of June 21, 1973 even *Memoirs* had been abandoned by all members of the court.

Since under Part I of the *Miller* decision there were no standards, the court thereupon in Part II proceeded to set forth a new three-fold or tripartite test to serve as a basis for the prosecution *only when* and provided that under the second prong of the test patently offensive hard-core sexual conduct was specifically defined so as to give fair notice. The court (page 24) states it acknowledged the dangers of regulating expression, and hence, the definitions of sexual conduct which can be prohibited "must be specifically defined by applicable State law as written or authoritatively construed."

After the court set forth the new tripartite test with examples of what might be proscribed as patently offensive depictions of sexual conduct, the court continued (page 25):

> "Under the holdings announced today, *no one will be subject to prosecution* for the sale or exposure of obscene materials *unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined* by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. * * *" (Emphasis supplied.)

On page 29 the court reiterated that it was only on June 21, 1973 that the court had agreed on concrete guidelines to isolate hard-core pornography. The Court said:

> "* * * But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, supra, and attempt to provide positive guidance to the federal and state courts alike." (Emphasis supplied.)

D. UNITED STATES V. 12-200 FT. REELS FOOTNOTE 7 – PROSPECTIVE APPLICATION.

In footnote 7 the court said that it was the duty of federal courts to authoritatively construe federal statutes and "we are prepared to construe such terms (i.e. obscene, lewd,

lascivious as used in the statute) as limiting regulated material to patently offensive *representations or descriptions of that specific hard core sexual conduct given as examples in Miller v. California.*" (Emphasis supplied.) We pass for the moment just how the court could construe a federal statute for arrests after June 21, 1973 with this wide range of permissible definitional options without legislating and without invoking an *Erie v. Tompkins* doctrine, and turn to prospective application.

(i) The court is prepared (in the future) to construe the federal statute to limit it to depictions of "hard core sexual conduct" which were for the *first time* and as of June 21, 1973 specifically set forth in *Miller.* This is a very clear statement that as of June 21, 1973 there was no definition of patently offensive hard-core sexual conduct, which the court said *must* be present before there can be any prosecution. Criminal convictions are not predicated on noneexistent standards and nonexistent definitions.

(ii) It would appear that the judicial statement in footnote 7 of the decision in *12-200 Ft. Reels,* supra, purporting to overrule a case wholly prospectively is in fact no more than a dictum, since it is by hypothesis, inapplicable to the parties or the controversy before the court. Nevertheless, such a dictum may be significant, with respect no future transactions or evens, as an indication that further reliance on the "overruled" case is no longer justified. In fact, such a dictum can achieve virtually the same effect without even using the word "overrule" in connection with the earlier decision. That is, the court, without declaring the earlier decision overruled, can simply issue a warning that subsequent to the date of the court's opinion or some specified future

date, any reliance on the earlier decision is unwarranted. If a person subsequently attempts to rely on the earlier decision despite this warning, the court, in deciding that person's case, can conclude that reliance after the date specified in the warning was unjustified, and the court can then declare, as a holding rather than as dictum, that the earlier decision is overruled. Thus, by using a two-stage overruling process, consisting first of a warning in the form of a dictum and secondly, if necessary, of a holding overruling an earlier decision, the court can achieve a desirable effect by changing a bad rule without defeating any strong, justifiable reliance interests.

Accordingly, it is conceivable that in the context of the enforcement of the State obscenity laws, which laws can only be authoritatively construed by a state appellant Court, that what this court has done is forewarned individuals who propose to engage in the business of selling sexually explicit materials that they may no longer rely upon the more permissive standards of the *Roth-Memoirs* formulation after the date of the court's decisional change of June 21, 1973. Any defendant on appeal to the high court for conduct engaged in post-June 21, 1973 may no longer say that a judicial construction in his case would be *ex post facto* when applied to him because as of the date of his alleged offense the court had not "authoritatively construed" federal statutes because, as was made significant in *Bouie v. City of Columbia*, supra, the hypothetical defendant could have foreseen the judicial gloss that was to be placed on the statute and thus the two-stage process suggested herein would be complete by (a) the authoritative judicial construction on the state obscenity statute, and (b) the affirmation of the conviction of a defendant tried under the proposed application of that statute for post-June 21, 1973 conduct.

To this counsel, the foregoing analysis is the only common sense one with regard to the intent of the court in its carefully chosen language utilized in footnote 7 of *12-200 Ft. Reels of Film*, supra, as to Federal legislation.

E. EX POST FACTO JUDICIAL LAWMAKING PROHIBITED.

As stated, punitive judgments are not predicated on nonexistent standards. At the same time, the new test and permissible definitions of legally proscribable obscenity may not be applied retroactively, which is why, incidentally, there were no affirmations of convictions by the Supreme Court in the sixty-eight (68) cases before it and vacated.

Under *Linkletter*, supra, the Blackstonian theory of automatic retroactivity was abandoned. In addition, in determining whether a new decision should be applied retroactively the Supreme Court has specifically held that unforeseen judicial enlargement of criminal statutes is prohibited as an *ex post facto* law, *Bouie v. City of Columbia*, supra, and many authorities, while not labeling it *ex post facto*, also proscribe the retroactive application of a decisional change in criminal law by a court which would work to the disadvantage of the accused.

Ex post facto laws (prohibited by Article], Sections 9 & 10 of the Constitution) generally include a change in the statutory law which in relationship to a criminal offense alters the situation of the accused to his disadvantage. *Thompson v. Utah*, 170 U.S. 343. Both the new serious literary, etc. value test and the new optional definitions of what might be proscribed as depictions of patently offensive hard core sexual

conduct substantially alter the situation of the pre-June 21, 1973 defendant to his obvious disadvantage. In *Bouie* the court said (378 U.S. at 353):

> "Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex post facto law such as Art. I § 10 (sic) of the Constitution forbids." (parenthesis and emphasis supplied.)

Bouie followed in *Love v. Fitzharris*, 460 F.2d 382, 385 (9th Cir. 1972), "new court decision making what was lawful when done, a crime *** prohibited by the Constitution."

While not labeled *ex post facto*, the decisions and authorities clearly prohibit a change in the criminal law by court decision which makes criminal that which was not criminal or expands the area of criminal liability by putting an interpretation on a statute which could not have been foreseen or cures a vagueness by that very decision. *James v. United States*, 336 U.S. 213, 221-222; *Shuttlesworth v. Birmingham*, 394 U.S. 147; *Bouie*, supra; *Rabe v. Washington*, supra, at p. 315; 20 Am. Jur. 2d Courts § 236; 51 Virginia Law Review 201, 254.

As previously maintained, the *James* case involved a prosecution for income tax evasion by one Mr. James who had embezzled funds but had not reported them. At the time James failed to report his income a Supreme Court decision in the Wilcox Case, *Commissioner v. Wilcox*, had held that embezzled funds did not constitute income. The Supreme Court held in *James v. United States*, supra, that the element of willfulness could not be proved in a criminal prosecution because James was entitled to rely on the statute with the

gloss placed upon it by Wilcox, and therefore the indictment had to be dismissed.

Shuttlesworth held a subsequent narrowing interpretation which can save a criminal statute cannot be applied retroactively. In *Shuttlesworth* the petitioner was convicted for failing to obtain a permit to have a parade. *Shuttlesworth* was convicted, his conviction was reversed on the grounds that the Birmingham ordinance granted too much discretion to the City of Birmingham in terms of denying parade permits. The highest court of Alabama by decision rewrote the city ordinance and after narrowly construing it, and thus saving it, thereupon reinstated *Shuttleworth's* conviction. The Supreme Court reversed. *Here pertinent,* the Supreme Court held that assuming the Alabama Supreme Court[s rewriting the ordinance was successful (394 U.S. at 155), that *Shuttlesworth* in 1963 could not have had the clairvoyance to foresee the narrowing construction which would ultimately be placed on the statute by the Alabama Supreme Court in 1967 (394 U.S. at 156).

In *Bouie,* supra, 378 U.S. at 352, the court in addition to *ex post facto* (though closely allied to it) said:

> "Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute."

In *Rabe* the Supreme Court of Washington held the motion picture obscene because of the context or location of its exhibition (it was an outdoor theatre). In reversing the Supreme Court said:

> "Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged from violation."

The court held no fair notice that criminal liability was dependent upon the place where the film was shown.

51 Virginia Law Review at 254:

> "As to judicial changes which expand the substantive criminal law the values seem to line up on the side of prospective limitation, but to be overshadowed by the principle prohibiting ex post facto criminal lawmaking, *which demands the same result in any event.*"

The statutory test in Georgia for determining what is obscene contains only three elements of the so-called *Roth-Memoirs* formulation but, at the moment by "authoritative judicial construction" only two (2) elements of the new tri-partite *Miller* test excepting specifically defined sexual conduct. Accordingly, the utilization of *Miller* standards for pre-June 21, 1973 conduct is violative of Petitioner's rights and this case should be reversed.

CONCLUSION

This Court in the original *Paris Adult Theatre I* case held that there was nothing that precluded "the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I and II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the *First Amendment* standards set forth in *Miller vs. California* ante, at 23-25."

The test set forth in *Miller* at page 24 reads in part:

"The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work taken as a whole, appeals to the prurient interest, *Kois vs. Wisconsin*, supra, at 230 quoting *Roth vs. United States*, supra, at 489; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

On page 25 of the *Miller* decision the Court stated:

"It is possible, however to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;

(b) patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals;"

This Court in concluding its ruling on *Paris Adult Theatre I vs. Slaton*, 413 U.S. at 69 stated:

"The Judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this Opinion and *Miller vs. California*, supra." See *United States vs. 12-200 Ft. Reels of Film*, post, at 130 n. 7."

What the Georgia Supreme Court then did in the October 30, 1973 decision was to hold as follows:

"Under the standards announced by the Supreme Court in *Miller*, inhering in prior judicial decisions of this Court, and taken in conjunction with *Georgia Code Annotated 26-2101* § § B, the basic guidelines for determining whether materials or films are obscene in Georgia may be stated substantially as follows:

Applying contemporary community standards and considering the material or film as a whole, the average person would find:

"(a) its predominant appeal is to a prurient interest in sex;

(b) the material or film is a patently offensive depiction or description of sexual conduct, *embodying a shameful or morbid interest in nudity*, sex or excretion, and going substantially beyond customary limits of candor in describing or representing such matters;

(c) the material or film taken as a whole lacks serious literary, artistic, political or scientific value, and,

(d) the material or film taken as a whole is utterly without redeeming social value."

(e) In looking at the construction or judicial gloss the State of Georgia Supreme Court has now placed upon its obscenity statute 26-2101(b). Where do we find the (b) element of the test as stated by this Court as being constitutionally required in *Miller vs. California*, 413 U.S. at pages 24 and 25, that is to say sexual conduct specifically defined by the applicable state law. Georgia's judicial gloss on the obscenity

standards represents a mish-mash of *Roth-Memoirs* and *Miller* WITH A little of *Jenkins v. State of Georgia* thrown in. Even the test as set forth that proposes to take that part of the *Roth-Memoirs* test that formally was applicable, is mishandled.

Accordingly, for all the reasons set forth in the arguments contained in this Petition for Writ of Certiorari Petitioners respectfully pray that the Judgment of the Supreme Court of the State of Georgia of October 30, 1973 be reversed, that the statute be held to be unconstitutional and the motion picture films determined not to be obscene in the constitutional sense.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1161

PARIS ADULT THEATRE, I,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE, II,
Petitioner,

v.

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Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
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Petition for a Writ of Certiorari
to the Supreme Court of Georgia

APPENDIX – VOLUME I

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APPENDIX

APPENDIX A

IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA

Civil Action No. B-61298
LEWIS R. SLATON,
as District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE,
as Solicitor General of the
Criminal Court of Fulton County,
Plaintiffs,
v.
PARIS ADULT THEATRE I,
ROBERT MITCHEM,
PHILLIP A. FISHMAN, CLIFF TERRY,
FRED PRICHARD, and
JOE BALLEW,
Defendants.

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v.
PARIS ADULT THEATRE II,
ROBERT MITCHEM, PHILLIP A. FISHMAN,
CLIFF TERRY, FRED PRICHARD, and
JOE BALLEW,
Defendants.

ORDER

The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are "It All Comes Out in the End" and "Magic Mirror."

Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

The actions against the Defendants, therefore, are dismissed.

This 12th day of April, 1971.

/s/ Jack Etheridge
Judge, Superior Court of
Fulton, County, Atlanta
Judicial Circuit.

APPENDIX B

In the Supreme Court of Georgia

Decided: Oct. 30, 1973

26631 SLATON, Et Al, v. PARIS ADULT THEATRE I, Et Al.

INGRAM, Justice. This case comes before the court again following decision and remand by the United States Supreme Court in Paris Adult Theatre I v. Slaton, 413 U.S. ____ 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). It began on December 29, 1970, when the District Attorney of the Atlanta Judicial Circuit and the Solicitor of the Criminal Court of Fulton County filed separate complaints in the Superior Court of Fulton County against Paris Adult Theatres I and II and certain named individuals, praying for a rule nisi to require the defendants to show cause why the motion picture films "It All Comes Out in the End," and "Magic Mirror" should not be declared obscene and enjoined from exhibition. A temporary restraining order was thereafter granted ex parte by the trial court restraining the defendants from destroying the films or removing them from the jurisdiction of the court pending a hearing. On January 31, 1971, pursuant to the rule nisi, an adversary hearing was conducted in superior court during which the parties agreed to waive jury trial and a preliminary hearing and to submit the cause to the trial court for final determination and judgment. The films were then exhibited to the trial court. The State offered no other evidence at the hearing except for the testimony of the criminal investigators who had paid admission to see the films and who related that nothing on the outside of the theatres indicated the full nature of that which was shown, namely, scenes of simulated fellatio,

cunnilingus and group sex intercourse.

After viewing the motion pictures and hearing the evidence, the trial court rendered the following judgment:

"The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, 'It All Comes Out in the End,' and 'Magic Mirror'. Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"It is the judgment of this court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions against the defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit."

On appeal from the above order, this court unanimously reversed the judgment of the trial court and held that the films were hard-core pornography and that the showing of these films should have been enjoined in that their exhibition to consenting adults was not protected by the First Amendment. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343 (185 SE2d 768) (1971). The United States Supreme Court granted certiorari on June 26, 1972, and thereafter on June 21, 1973, vacated the judgment of this court and remanded the case for further proceedings not inconsistent with its opinions rendered in *Paris Adult Theatre I v. Slaton*, 413 U.S. ____, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973), and *Miller v. California*, 413 U.S. ____, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). See, also, *United States v. 12 200-Ft. Reels of Super 8 mm Film*, 413 U.S. ____, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973).

On August 27, 1973, we granted counsel for opposing sides and the Attorney General, leave to submit briefs to assist this court in assessing the effect of these opinions upon the earlier judgment of this court and upon the legislative enactments of this State on obscenity.

I.

OVERBREADTH

It is now firmly established that "obscenity" is not protected by the Free Speech Clause of the First Amendment and may be regulated by the State. *Miller v. California*, 413 U.S. ____, 37 L.Ed. 2d 419, 93 S. Ct. 2607 (1973); *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In order to maintain the integrity of the First Amendment and to prevent incursions into areas of protected speech and expression, the United States Supreme Court has made it necessary, however, that regulatory statutes be carefully limited to define specific

sexual conduct to whose depiction and description they apply. *Miller v. California,* 413 U.S. at ____, 37 L. Ed. 2d at 430, 93 S. Ct. at 2615 (1973). In *Miller* and in *United States v. 12 200-Ft. Reels of Super 8 mm Film,* 413 U.S. ____, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973), the Court made clear that this statutory requirement could be met by specific legislation, as e.g., Oregon Laws 1971, c. 743, Art. 29 §§ 255-62 and Hawaii Penal Code, Title 37, §§ 1210-16, and as well by authoritative judicial interpretation of legislation such as Ga. Code Ann. §26-2101(b) (Ga. L. 1968, pp. 1249, 1302).

In *Miller*, the Court settled upon minimal, factual guidelines for describing obscene material. The constitutional test was whether:

"(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

"(b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and,

"(c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Miller v. California, 413 U.S. at ____, 37 L.Ed. 2d at 431, 93 S. Ct. at 2615. In addition, with respect to part (b) of the above test, the Court gave examples of permissible statutory definition:

"(a) Patently offensive representations or depictions of ultimate sexual acts, normal or perverted, actual or simulated."

"(b) Patently offensive representations or depictions of masturbation, excretory functions, and lewd exhibition of the genitals."

The definition of obscenity under Georgia statutory law is as follows: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters . . . " Ga. L. 1968, pp. 1249, 1302, as amended; Ga. Code Ann. §26-2101 (b). In the past, this court has defined and described conduct as obscene within the meaning of the Georgia statute in substantially the same language as that suggested by the Supreme Court in *Miller.* In *Evans Theatre Corp. v. Slaton,* cert. den. 404 U.S. 950 Nov. 9, 1971 227 Ga. 377, 379 (180 SE2d 712) (1971), we dealt with depictions of "acts of sexual intercourse, natural, unnatural, bizarre, and violent." In *Walter v. Slaton,* 227 Ga. 676, 680 (182 SE2d 464) (1971), the films were of "actual sexual activity, both natural and unnatural," which included sexual intercourse, fellatio and cunnilingus. For a similar description of obscene material, see *1024 Peachtree Corp. v. Slaton,* 228 Ga. 102 (184 SE2d 145) (1971). These decisions are, in effect, interpretations of that portion of the Georgia statutory definition providing that material "is obscene if . . . . its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion . . . " Code Ann. §26-2101(b). These cases specifically "limit" the phrase they interpret, and a fair reading of them leads to the conclusion that the Georgia statute was designed to reach only "hard-core pornography," outside of First Amendment protection. *Slaton v. Paris Adult Theatre I,* 228 Ga. 343, 347 (185 SE2d 768) (1971). They reflect substantially the same descriptive language as that used in the examples of the Supreme Court in *Miller:* "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . (and) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 314 U.S. ____ 37 L. Ed. 2d at 431, 93 S. Ct. at 2615

We, therefore, conclude that the Georgia statute has been specifically delineated in a manner consistent with the new *Miller* standards, In rejecting counsel's constitutional challenge to the statute we therefore reaffirm our prior ruling that it is not overly broad or vague in definition. *Gornto v. The State,* 227 Ga. 46 (178 SE2d 894) (1970); see *Gable v. Jenkins,* 309 F. Supp. 998 (N.D. Ga. 1969), *aff'd. per curiam,* 397 U.S. 592 (1970) and noted in *Paris Adult Theatre I v. Slaton,* supra, 413 U.S. at ____ N. 1, 37 L. Ed. 2d at 453, N.1, 93 S. Ct. at 2642, N. 1.

II.

DUE PROCESS

The appellees contend that the Georgia statute as construed cannot be applied retroactively and that any detriment found in the *Miller* guidelines, as opposed to the prior *Memoirs* guidelines (Memoirs v. Massachusetts, 383 U.S. 413 (1966)). upon which Ga. Code Ann. §26-2101(b) is based, cannot be imposed upon them save in violation of due process of law.

The reply to this argument is that the Georgia statutory definition has been previously authoritatively construed by this court to include those standards for obscenity as permitted by *Miller.* In addition, the *Miller* guidelines allow a State to regulate material lacking in serious literary, artistic, political or scientific value, whereas under the *Memoirs* test (Ga. Code Ann. §26-2101(b)) the material also must be shown to be "utterly without redeeming social value." See *Jenkins v. State,* 230 Ga. 726 (SE2d) (1973). Thus, the *Memoirs* test, as construed to include standards offering greater protections to free speech and expression than those in *Miller,* is fully applicable to the pre-*Miller* defendant. See *United States v. Thevis,* No. 71-2614 (5th Cir., decided September 12, 1973); cp. *People v. Enskot,* 13 Cr. L. Rptr. 2522 (Cal. Ct. App. 2d Dist. August 8, 1973), and *United*

States v. 1 Reel of Film, 481 F2d 206 (1st Cir. 1973). There can be no serious question that the appellees have been afforded the benefit of this, the *Memoirs* test, and that their situation has not been substantially altered by the application of the standards of *Miller*, already prevailing in this State under statutory and decisional law.

In summary, this court has previously construed the statutory definition of obscenity in a manner authorized by the new *Miller* guidelines and therefore has not judicially enlarged Ga. Code Ann. §26-2101 (b). The cases cited by the appellees which prohibit such practice, *Rabe v. State*, 405 U.S. 313 (1972), and *Bouie v. Columbia*, 378 U.S. 347 (1964), are not in point. There has been no unconstitutional, subsequent, contraction of an overly-broad statute to save its application retroactively. cp. *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

III.

STANDARDS

In *Miller v. California* supra, the Supreme Court clarified the "community standards" to which the obscenity guidelines were to apply, disavowing that of the nationwide community in favor of that of the state. 413 U.S. at ____ 37 L. Ed. 2d at ____ 93 S. Ct. at 2618-20. In view of *Miller* and of the constitutional responsibility placed upon this court to conduct independent appellate determinations of the issue of obscenity vel non, we hold the "community" by which the standards for obscenity are gauged is that community or polity which is the State of Georgia.

Secondly, it is also no longer necessary in cases where the materials themselves are available for inspection by the finder of fact that expert testimony be produced on behalf of the prosecution. *Paris Adult Theatre I v. Slaton*, 413 U.S. at

—— 37 L. Ed. 2d at 456, 93 S. Ct. at 2634. See, also, *United States v. Groner*, 479 F2d 577 (5th Cir. 1973).

Thirdly, the Supreme Court has rejected the ruling of the trial court in *Paris Adult Theatre I v. Slaton*, supra, that exhibition of obscene material or film to consenting adults is constitutionally permissible. The Court stated, "We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court." 413 U.S. at ——, 37 L. Ed. 2d at ——, 93 S. Ct. at 2635.

And finally, under the standards announced by the Supreme Court in *Miller*, inhering in prior judicial decisions of this court, and taken in conjunction with Ga. Code Ann. §26-2101 (b), the basic guidelines for determining whether materials or films are obscene in Georgia may be stated substantially as follows:

Applying contemporary community standards and considering the materials or film as a whole, the average person would find:

(a) its predominant appeal is to a prurient interest in sex;

(b) the material or film is a patently offensive depiction or description of sexual conduct, embodying a shameful or morbid interest in nudity, sex or excretion, and going substantially beyond customary limits of candor in describing or representing such matters;

(c) the material or film taken as a whole lacks serious literary, artistic, political or scientific value, and,

(d) the material or film taken as a whole is utterly without redeeming social value.

IV.

CONCLUSION

In the instant case, the films "It All Comes Out in the End" and "Magic Mirror" depicted actors cavorting indiscriminately in the nude, in a manner designed to appeal to the prurient interests; they depicted simulated acts of intercourse and fellatio. This court has already found these films obscene. In *Slaton v. Paris Adult Theatre, I,* 228 Ga. 343, 347 (185 SE2d 768) (1971),we said: "The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character."

We affirm our original decision. The court has again conducted an independent appellate review of the films, and they have been exhibited to those members of the court now sitting who did not participate in the prior ruling. These members have likewise concluded that the films are obscene under the above standards. The judgment of the trial court is, therefore, reversed with direction that it enter an order permanently enjoining the exhibition of the films.

Judgment reversed with direction. *All the Justices concur.*

In the Supreme Court of Georgia

26631. SLATON, et al. v. PARIS ADULT THEATRE I, et al.

GUNTER, Justice (concurring specially). I concur in the Court's judgment of reversal today solely because I consider that I am bound by the majority decisions of the Suprem Court of the United States in Paris Adult Theatre I v. Slaton, supra and Miller v. California, supra, rendered June 21, 1973.

Were it not for those two recent decisions I would hold that the Georgia statute (Code §26-2101) which permits the State to suppress "obscene materials" is vague and overly broad so as to be constitutionally unenforceable.

While I do not consider the First Amendment to be absolute, it is my view that First Amendment proscriptions, made applicable to Georgia by the Fourteenth Amendment, do not permit the State to suppress expression unless such suppressed expression is clearly defined by the State so that a reasonable man can (one whole line is illegible in copy) suppressed expression. The definition of "obscene materials" that may be suppressed by the State, contained in the present Georgia statute, does not, to my mind, come even close to establishing that line of demarcation. A reasonable man or, for that matter, seven supposedly reasonable judges, utilizing objective criteria which in the last resort end up being really subjective criteria, cannot distinguish constitutionally protected material from material that is unprotected by the First Amendment.

The net result of the Miller (obscenity concept) case is that this Court acts as a seven-man board of censors in the state of Georgia, and the Supreme Court of the United States acts as a nine-man board of censors throughout the nation, with a majority of this Court determining what is constitutionally protected or unprotected in Georgia and a majority of the Justices of the Supreme Court of the United States determining what is constitutionally protected or unprotected at the national level. As Mr. Justice Brennan so aptly put it in his dissenting opinion Paris Adult Theatre I: "The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." See also the decision of this Court in Jenkins v. The State, _____ Ga. _____; _____ SE2d _____, (1973).

However, because of the majority decision in Miller v. California and Paris Adult Theatre I v. Slaton, supra, I am required to hold that the present Georgia statute defining obscene material that may be suppressed by the State is not a constitutionally vague and overbroad statute.

I therefore concur in the judgment of reversal.

APPENDIX C

FIRST, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT, U.S.C. and Georgia Code § 26-2101

FIRST AMENDMENT, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

GEORGIA CODE § 26-2101

26-2101. Distributing obscene materials.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social

value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302, 1971, p. 344.)

(Page 138, Criminal Code of Georgia.)

APPENDIX D

UNDECIDED CASES

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1973-74
Dec. 4, 1973

6 Div. 509, 510, 511, 512
513, 514, 515, 516

Chester McKinney
v.
City of Birmingham

Appeal from Jefferson Circuit Court

TYSON, JUDGE

The Appellant, Chester McKinney, was the manager and operator of the "Pussy Cat Adult Theatre," located at 7610 First Avenue, North, Birmingham, Alabama. On each of the dates shown below, Sergeant J.C. Wilson of the Birmingham Police Department purchased a ticket and then viewed each of the "feature films" and also each of the "short subject films" being shown at the theatre in question. Following this, Sergeant Wilson then took Municipal Court Judge T.M. Smallwood to the theatre, where he too purchased a ticket, and then viewed each of the "feature films" and "short subject films" in its entirety before issuing warrants for the arrest of the appellant, and, contemporaneously therewith, search warrants for the seizure of both the "feature films" and "short subject films" then being shown. Each of the films

in question is in color, the "feature films" being on one sixteen-millimeter reel, and the second reel seized on each date contained three "short subject films" in color, but without sound. The City charged the appellant with the violation of Municipal Ordinance No. 67-2, Section 2, of the City Code, by virtue of knowingly exhibiting obscene color motion picture films.

DATE	FEATURE FILMS
April 14, 1971	"Vice Hustler" [Also short subject film seized]
May 5, 1971	"Dead Eye Dick" [Also short subject film seized]
July 21, 1971	"Love on a Mountain" [Also short subject film seized]
August 18, 1971	"Fantasy of Love" [Also short subject film seized]

The City made separate cases for the "feature film" and the "short subject film" on each of the dates in question, there being a total of eight cases which are here consolidated on appeal. Each of the eight cases was presented through stipulation through the City and appellant's counsel to Circuit Judge E.C. Watson, Jr., and the trial judge's order as to each of the eight cases in pertinent part reads as follows:

> "The Court, having reviewed the stipulation of facts and the exhibits as a whole, finds that the movie involved is nothing but a film graphically depicting nude men and women with their genitals fully exposed in poses and activities involving actual sexual intercourse, fellatio, cunnilingus between both males and females and other sexual activities, all of which constitute hard core pornography and are obscene within the words of the ordinance and the United States Supreme Court test for determining obscenity for that the dominant theme of the movie appeals to

the prurient interest of the average person when taken as a whole, applying contemporary community standards, is patently offensive in that the movie goes beyond the customary limits of candor and explicitness in its representation of sexual matters, and is utterly without any redeeming social value or importance, notwithstanding the fact that there were no juveniles involved and there was no thrusting of the material upon unwilling individuals and there was no pandering in the exhibition of said movie . . . "

I.

The appellant first contends that if any offense was committed on the dates in question, only one offense was committed in that the act in question was a continuous one for which only one charge should be made. Appellant filed a plea of autre fois convict as to the "short subject film" charge on each date in question, and cites to this Court *Rutherford v. State,* 49 Ala. App. 246, 270 So. 2d 678, cert. den. 289 Ala. 751, 270 So. 2d 679.

A plea of former jeopardy, such as is here present, is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied upon under the plea in question. *Rutherford,* supra, and cases cited therein.

This Court has viewed each of the eight reels in its entirety and finds that they are not precisely the same in law and fact; hence, the trial court properly denied appellant's pleas in this respect.

II.

Appellant next contends that the United States Supreme Court in its recent opinion in *Miller v. California* ____ U.S. ____, 93 S. Ct. 2607, 37 L. Ed. 2d 419, pronounced new standards for courts' guidance as to what

constitutes obscenity as a matter of law, and therefore to apply the *Miller* standards in the cases in question would "constitute ex post facto laws."

In *Miller*, supra, the Supreme Court of the United States, through Mr. Chief Justice Burger, announced the following standard:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, *supra*, 408 U.S., at 230, 92 S. Ct. at 2246 (1972), quoting Roth v. United States, *supra*, 354 U.S., at 489, 77 S. Ct. at 1311 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the *'utterly* without redeeming social value' test of Memoirs v. Massachusetts, *supra*, 383 U.S., at 419, 86 S. Ct., at 977 (1966); that concept has never commanded the adherence of more than three Justices at one time. See pp. 2613-2614, *supra*,. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary . . . ." [Cases cited.]

Further, from *Miller:*

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await

their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, *supra:*

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See Kois v. Wisconsin, *supra,* 408 U.S. at 230-232, 92 S. Ct., at 2246-2247 (1972); Roth v. United States, *supra,* 354 U.S. at 487, 77 S. Ct., at 1310 (1957); Thornhill v. Alabama, 310 U.S. 88, 101-102, 60 S. Ct. 736, 743-744, 84 L. Ed. 1093 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide, as we do with rape, murder and a host of other offenses against society and its individual member."

This Court does not subcribe to appellant's "ex post facto" argument. Article I, Sections 9 and 10 of the

United States Constitution are directed to "legislative enactments" rather than judicial decisions. *Frank v. Mangrum*, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969.

Moreover, the standards above set forth in *Miller* have to do with the burden of proof upon the prosecution rather than to adopt a new constitutional standard or test of obscenity. *Miller* points out that the third prong of the Roth[1]-Memoirs[2] Test "called on the prosecution to prove a negative, i.e., that the material was "*utterly* without redeeming social value" – a burden virtually impossible to discharge under our criminal standards of proof."

We have viewed the films in question and find that they fall squarely within the definition of legal obscenity as stated above in *Miller*, supra.

III.

Appellant next contends that there was no pandering, no thrusting upon unwilling adults, and that the matter was exhibited in a place of public accomodation, a so-called adult theatre from which minors were excluded. In *Paris Adult Theatre I v. Slaton*, ____ U.S. ____, 93 S. Ct. 2628, 37 L. Ed. 2d 446, announced by the Supreme Court on the same date as *Miller*, supra, the Court dealt directly with this contention. From this case we quote:

> "To summarize, we have today reaffirmed the basic holding of the United States v. Roth, *supra*, that obscene material has no protection under the First Amendment. See Miller v. California, *supra*, and Kaplan v. California, ____ U.S. ____, 93 S. Ct. 2680,

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[1] *Roth v. United States*, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[2] *Memoirs v. Massachusetts*, 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966).

37 L. Ed. 2d 492 (1973). We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights. We have also reaffirmed the holdings of United States v. Thirty-Seven Photographs, *supra*, that commerce in obscene material is unprotected by any constitutional doctrine of privacy. United States v. Orito, *supra*, ____ U.S., ____ at pp. ____ – ____ 93 S. Ct. 2674, at pp. 2676-2678 (1973); United States v. Twelve 200-Ft. Reels, *supra*, ____ U.S. ____, at pp. ____ – ____, 93 S. Ct. 2665, at pp. 2668-2669 (1973). In this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accomodation, including so-called 'adult' theatres from which minors are excluded . . ."

Moreover, since the films in question were stipulated into evidence as evidence "pro and con" of the respective contentions, as stated in *Paris Adult Theatre I v. Slaton*, supra:

"Nor was it error to fail to require 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . ." [Cases cited]

IV.

Appellant finally contends that Birmingham City Ordinance No. 67-2 is unconstitutionally vague in that it does not specifically define "hard core sexual conduct" and further that a national standard controls rather than standards applicable in local communities. This national standard versus local standard argument was rejected in *Miller* with the following observation:

"We conclude that neither the State's alleged failure to offer evidence of 'national standards,' nor the trial

court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact . . ."

Further, the *Miller* standards are now read into the Ordinance in question and such Ordinance has heretofore been upheld as constitutional on its face, and this Court also so holds. *Entertainment Ventures, Inc. v. Brewer,* 306 F. Supp. 802.

Finally, we find that, since there was no request or demand by the appellant that the films in question be returned to the exhibitor to be shown pending a judicial determination on the issue of obscenity vel non, we find that such were lawfully seized as evidence in the several cases in question inasmuch as here there was a determination by a neutral and detached magistrate on the issue of obscenity prior to their seizure. *Heller v. New York,* —— U.S. ——, 93 S. Ct. 2789, 37 L. Ed. 2d ——, states:

"But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued

pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned."

We have carefully reviewed each of these eight cases, as the court must do in protecting First Amendment rights, including all the exhibits, and find that each falls squarely within the *Miller* definitions of obscenity, therefore, these judgments of the trial court are due to be and each of the same is hereby affirmed. *Jacobellis v. Ohio*, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793; *United States v. Groner*, U. S. 5th Cir.(1973), ____ Fed. 2d ____, Slip Sheet No. 71-1091; *United States v. Thevis*, U. S. 5th Cir.(1973), ____ Fed. 2d ____, Slip Sheet No. 71-2614; *McKinney v. State*, 287 Ala. 648, 254 So. 2d 714; *Brazelton v. State*, 50 Ala. App. ____, 282 So. 2d 342.

AFFIRMED.

All the Judges concur.

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1973-74

Filed
Jan. 15, 1974

6 Div. 577

George Harlow
v.
City of Birmingham

6 Div. 582

Thomas D. McGary
v.
City of Birmingham

6 Div. 585

Michael Robinson
v. City of Birmingham

Appeals from Jefferson Circuit Court

HARRIS, JUDGE

These three appeals were argued and submitted on December 6, 1973, upon a motion of appellants to consolidate alleging that the questions of law and fact are the same in each case. The motion to consolidate further alleges that the actions involve substantially the same subject matter, save and except that the publications involved are different in name and content.

Appellants in each case were employees of the Pussycat Adult Theatre Bookstore located at 7610 First Avenue North in the City of Birmingham, Alabama, and were so employed at times which are material to the issues involved. All cases were tried on a Stipulation of Facts in the trial below.

It was stipulated that the exterior of the Pussycat Adult Theatre Bookstore clearly and distinctly displays "Adult Only" signs, both on the inside and on the outside, its windows being painted so that a person on the outside in unable to see the materials being sold on the inside of said establishment. The bookstore is located in the lobby inside the Pussycat Adult Theatre.

In case no. 577 appellant sold a magazine entitled, "Confidential: Sex" (Adult Only). This magazine graphically describes the erogenous zones of both male and female. The term "erogenous" is aptly described as being something that is "sexually arousing" or "sexually stimulating", therefore, anything that arouses or stimulates the sensual desires can be placed into the erogenous areas. Every page shows nude males and females engaged in actual sexual intercourse, fellatio, cunnilingus between both males and females, sodomy, other sexual activities including group sex and written descriptions of such activities with uncaptioned photographs actually depicting these activities. This was the city's exhibit in this case.

In addition to the above description, the magazine contains a number of lurid stories with photographs depicting sexual activities entitled "I Was Raped By A Black and Now Refuse Abortion"; "Confidential Stories of Wife Swapping Parties"; "I Carried My Father's Child"; A Housewife Confesses: I Was Bored With Sex"; and "Smoking Pot Changed My Sex Life".

These articles are loaded with gutter-type sexual slang and interspaced with an abundance of four-letter words.

Case no. 582 involved one illustrated paperback book entitled "Black and White Love". This was the city's exhibit.

Case no. 585 involved one paperback book entitled "Photo-Illustrated – Psychology of Group Sex". This was the city's exhibit.

Based upon the Stipulation in each case, together with the exhibits, the trial court rendered a decree finding each defendant guilty of violating Ordinance No. 67-2, Section 3, of the City of Birmingham.[1]

In each case identical demurrers were filed and overruled. In each case identical motions to quash the complaints were overruled. The pleadings raised constitutional questions about the ordinance, and, in each case, asserted that the particular materials involved were not obscene in the constitutional sense, as a matter of law, and therefore, were protected by the First Amendment.

The judgment entries in each case were substantially the same, and, in pertinent part, read as follows:

> "This the 7th day of May, 1973, the objection the evidence being considered by the court, it is ordered that said objection be and the same is hereby overruled for that the book was purchased by the City of Birmingham and was reviewed by a Recorder of the City of Birmingham who issued a Complaint of Arrest in accordance with the constitutional and statutory provisions of the laws of the City of Birmingham, State of Alabama, which do not require any prior adversary proceeding. The court has reviewed stipulation of facts and exhibits as a whole and advises that the paperback (magazine) involved is nothing but a publication graphically depicting nude men and women with their genitals fully exposed in poses and activities involving actual sexual

intercourse, fellatio, cunnilingus between both male and females, sodomy, other sexual activities including group sex and written description of such activities interspaced between uncaptioned photographs actually depicting these activities, all of which constitute hard core pornography and such paperback (magazine) is obscene within the words of the City Ordinance and the United States Supreme Court test for determining obscenity for that the dominant theme of the paperback (magazine) appeals to the prurient interest of the average person when taken as a whole, applying contemporary community standards, is patently offensive in that the paperback (magazine) goes beyond the customary limits of candor and explicitness in its representation of sexual matters; and is utterly without any redeeming social value or importance notwithstanding the fact that there were no juveniles involved and there was no thrusting of the material upon unwilling individuals and there was no pandering in the exhibition of said paperback (magazine) and therefore the court, upon deliberating the facts and applying the law, finds the defendant guilty as charged in the Complaint."

The court imposed a fine of $300.00 and costs in each case, and sentenced each defendant to a term at hard labor for non-payment of the fine and costs. The trial court as additional punishment sentenced each defendant to hard labor for the City of Birmingham for six months.

Like the trial court, we, too, have examined the sordid publications made exhibits to these records on appeal. Without the slightest hesitation, we stamp these publications with the label "obscene material and hard core pornography" which, "taken as a whole appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v.*

California, ____; U.S. ____, 93 S.Ct. 2607, 35 L.Ed.2d ____ *Kaplan v. California*, ____ U.S. ____, 93 S.Ct. 2680, 35 L.Ed.2d ____.

These publications are made up "entirely of repetitive descriptions of physical, sexual conduct", accompanied by black and white and colored photographs "explicit and offensive to the point of being nauseous. Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described", and depicted.

In *McKinney v. State*, 287 Ala. 648, 254 So.2d 714, in treating a similar publication, the Supreme Court said:

> "Amidst the sea of words and the shifting sands of legal writing as to what constitutes obscenity not subject to sale and distribution to adults one can well be led away from solid ground. The appellant refers again and again in his brief to the magazines as 'girlie' magazines. A more apt description would be 'genital' magazines. No claim is made or proof offered that they were of any artistic merit or other than lewd in general content or had any appeal other than prurient. Even a cursory examination reveals their wholly pornographic nature from which pollutants of the mind is all that could emanate."

The above quotation is peculiarly applicable here and as applied by the trial court in these three cases.

We hold that the City Ordinance under which these prosecutions arose is constitutional when measured by the tests prescribed by *Miller v. California*, supra, and the judgments of the trial court in each case are affirmed.

AFFIRMED.

All the Judges concur.

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[1] "ORDINANCE NO. 67-2

"AN ORDINANCE TO MAKE UNLAWFUL THE POSSESSION, PUBLISHING, PRINTING, MANUFACTURING, SALE, DISTRIBUTION, ADVERTISEMENT OR EXHIBITING OF OBSCENE MATTER IN THE CITY OF BIRMINGHAM OR THE POLICE JURISDICTION THEREOF AND PRESCRIBE PENALTIES THEREFOR.

"BE IT ORDAINED by the Council of the City of Birmingham as follows:

"Section 1. The following words and terms, when used in this ordinance, shall for the purpose of this ordinance have the meanings respectively ascribed to them by this section:

"A. 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, predominant appeal shall be judged with reference to such audience. If the subject matter is distributed to minors under 18 years of age, predominant appeal shall be judged with reference to an average person of the actual age of the minor to whom such matter is distributed.

"B. 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription,

or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

"C. 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

"C. 'Distribute' means to transfer possession of, whether with or without consideration.

"E. 'Knowlingly' means having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect it for the purpose of avoiding such disclosure.

"F. 'City' means City of Birmingham, Alabama.

"Section 2. It shall be unlawful for any person to knowingly send or cause to be sent or bring or cause to be brought into this City or the police jurisdiction thereof, for sale of distribution, any obscene matter.

"Section 3. It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the City or the police jurisdiction thereof, any obscene matter."

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 5452

JAMES JAY KAPLAN, APPELLANT
v.
UNITED STATES, APPELLEE.

Upon Remand from the
United States Supreme Court

(Remanded June 25, 1973
Decided November 21, 1973)

J. Clifford Allder, for appellant.

Harold H. Titus, Jr., United States Attorney, with whom *John A. Terry* and *William M. Brodsky,* Assistant United States Attorneys, were on the supplemental memorandum, for appellee.

Before Kern and Gallagher, Associate Judges, and Hood, Chief Judge, Retired.

PER CURIAM: The Supreme Court of the United States vacated the judgment this court had entered in this case on May 10, 1971, in an opinion reported at 277 A.2d 477, which had affirmed appellant's conviction for presenting an obscene film in a "peep-show" machine, and remanded the case for our further consideration in light of its recent decisions dealing with obscenity. *See* 93 S. Ct. 3030 (1973).

After reviewing the record and briefs filed at the time of the argument and considering the supplemental memoranda we permitted the parties to file after the Supreme Court's mandate to us and the decisions cited in such mandate we reinstate our judgment affirming appellant's conviction for

violation of D.C. Code 1973, § 22-2001 and reaffirm our prior opinion.

So ordered.

IN THE SUPREME COURT
OF FLORIDA
JULY TERM, A. D. 1973

Received
Nov. 2, 1973

JAMES E. RHODES,
Appellant,
v.
THE STATE OF FLORIDA,
Appellee.

CASE NO. 41,416

Opinion filed September 19, 1973

An Appeal from the Court of Record in and for Escambia County, M. C. Blanchard, Judge

Paul Shimek, Jr. for Appellant

Robert L. Shevin, Attorney General; and Raymond L. Marky, Assistant Attorney General, for Appellee

DEKLE, J.

We deal here with the "old" Florida obscenity statute, § 847.011, which continues as law.[1] Two movie films

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[1] An additional obscenity statute in 1973, Ch. 73-120, was enacted substantially in accordance with the obscenity statute of the State of Georgia, Ga. § 26-2101, which had been upheld in Gable v. Jenkins, U.S.D.C., N.D.Ga., 1969; 309 F.Supp. 998; per curiam aff. Apr. 20, 1970, 397 U.S. 592, 90 S.Ct. 1351.

publicly exhibited by appellant at his Navy Point Adult Theater in Pensacola, titled "He and She" and "Sex Family Robinson on the Farm" were found by a jury to be obscene in violation of Florida's 1967 obscenity statute, § 847.011, which prohibits the sale, distribution, showing or possession of "any obscene, lewd, lascivious, filthy, indecent, sadistic or masochistic book, magazine . . . photograph, motion picture film . . ." There is no further amplification of these words in the statute[2] except (11)[3] setting forth the *Roth* test.[4]

Inasmuch as § 847.011(8) (b) injunctive proceedings were not invoked in this cause, the injunctive portion of the statute is of course not involved here.[5]

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[2] The next sections of the obscenity statutes, §§ 847.012 and 847.013, as to persons under 17 years of age, give explicit definitions to such words and terms which are used there by the Legislature in the 1969 adoption of those sections.

[3] Fla. Stat. § 847.011 (11 formerly (10)): "For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

[4] Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

Memoirs of course came later in 1966 (J. Cleland's Memoirs of a Woman of Pleasure v. Atty. Gen. of Mass., 1383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1) adding to the test: that "the material is utterly without redeeming social value."

[5] May v. Harper, 250 So.2d 880 (Fla. 1971); Davison v. State, 251 So.2d 841 (Fla. 1971); Austin v. Meyer, U.S.Sup. Ct. No. 70-35 opinion June 25, 1973 vacating judgment of U.S. District Court, Middle District of Florida, at 319 F. Supp. 457 and remanding for further consideration in light of Miller v. California, _____ U.S. _____, 93 S.Ct. 2607, 36 L.Ed.2d _____ (1973); and related cases of the same "cluster" of opinions of June 25, 1973.

Appellant's offense occurred on May 5, 1971, under the earlier statute in question, § 847.011 to which our holding must of course be restricted, despite the recent June 21, 25, 1973, "cluster" of eight U.S. Supreme Court opinions on this perennial and "seemingly intractable" problem of obscenity in the courts.[6]

Appellant launches the following missiles of constitutional attack:

(1) unlawful search and seizure precluding admission of the films into evidence;

(2) non-obscenity of the films in question as a matter of law;

(3) unconstitutionality of Fla. Stat. § 847.011 because:

a) the statute does not provide for an adversary judicial hearing on obscenity prior to issuance of the warrant of seizure;

b) national and not contemporary community standards apply;

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[6] Miller v. California, _____ U.S. _____, 93 S.Ct. 2607, 36 L.Ed.2d _____ (1973); Paris Adult Theatre I v. Slaton, _____ U.S. _____, 93 S.Ct. 2628, 36 L.Ed.2d _____ (1973); Haplan v. California, _____ U.S. _____ 93 S.Ct. 2680, 36 L.Ed.2d _____ (1973); U.S. v. 12200 ft. Reels of Super 8mm Film, _____ U.S. _____, 93 S.Ct. 2665, 36 L.Ed.2d _____ (1973); U.S. v. Orito, _____ U.S. _____ 93 S.Ct. 2674, 36 L.Ed.2d _____ (1973); Heller v. N.Y., _____ U.S. _____, 93 S.Ct. 2780, 36 L.Ed.2d _____ (1973); Roaden v. Ky., _____ U.S. _____, 93 S.Ct. 2796, 36 L.Ed.2d _____ (1973); and Alexander v. Virginia, _____ U.S. _____, 93 S.Ct. 2803, 36 L.Ed.2d _____ (1973).

c) neither the statute, court rule nor practice and procedure in the courts provides for a prompt and final determination of the alleged obscenity.

SEIZURE WAS PROPER

Factually, appellant was tried and convicted by a jury based upon an indictment for violation of Fla. Stat. § 847.011. The grand jurors viewed either all or part of the two films involved. Some jurors viewed all of one film but not all of the other. Based upon affidavits submitted by the grand jurors and founded upon their collective viewing of the films as to content, the circuit judge issued a warrant for seizure of the films in question without a prior adversary judicial hearing. Immediately thereafter, the film was seized and the next day the indictment was returned by the grand jury against appellant. Motion to suppress was denied. During the trial the films were actually shown to the jury, then testimony was taken. The trial judge in acting upon appellant's motions expressly declared Fla. Stat. § 847.011 constitutional and this direct appeal followed.[7]

Upon appellant's first challenge – seizure – he cites *Roaden v. Ky*, U.S. Sup. Ct. No. 71-1134, June 25, 1973, ____ U.S. ____, which reversed denial of the motion to suppress obscene films on the ground of illegal seizure. Our case is no *Roaden*. In *Roaden* the seizure was clearly erroneous in that it was made without a warrant, simply upon a viewing of the film by a county sheriff at a local drive-in theater and without any prior judicial determination of obscenity. *Sub judice* 1) a warrant was issued; 2) following a consideration by the judge of sufficient factual affidavits of the grand jurors who went and viewed the films. Thus there was a prior judicial determination by the circuit judge, and at

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[7] Fla. Const. art. V, § 3(b)(1).

all times thereafter there was an available judicial review of the ruljng (though appellant sought none).[8] The seizure was legal and the motion to suppress was correctly denied.[9]

EX POST FACTO APPLIES

The new U.S. Supreme Court cases are at once both amplifying and more restrictive: they are expansive in 1) expressing the principle of "authoritative construction"[10] to amplify the statutory language in order to meet whatever test is applicable on the date of the offense in question, and 2) in laying down a prospective new test which is less restrictive than *Roth-Memoirs;* but these new holdings also more severely limit the state in its permissible statutory regulation of obscenity to so-called 'hardcore" materials of sexual acts expressly defined either in the statute or by authoritative construction thereof.

On the matter of standards of obscenity, the U.S. Supreme Court has now afforded a sensible test and guidelines in *Miller v. California,* ____ U.S. ____, (1973), 41 U.S.L.W. 492, and *Paris Adult Theater I v. Slaton,* ____ U.S. ____, (1973), 41 U.S.L.W. 4935, decided on June 21, 1973. The new test will no doubt prove more effective in future infractions of § 847.011 and of the new Fla. Stat. Ch.

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[8] See Fla. Stat. § 933.14 – Return of Property Taken Under Search Warrant.

[9] Heller v. New York, U.S. Sup. Ct. No. 71-1043 decided June 25, 1973, _____ U.S. _____, citing U.S. v. 37 Photographs, 402 U.S. 363, 367 (1971); Freedman v. Maryland, 380 U.S. 51, 57-59 (1965).

[10] This Court had previously recognized the "amplication" principle in 1969 in State v. Reese, 222 So.2d 732, 734 (Fla. May 7, 1969), quoted in So. Fla. Art Theatres v. State ex rel. Mounts, 224 So.2d 706, 709 (Fla.App. 1st, Sept. 8, 1970).

73-120. We cannot, in our view, however, by reason of *ex post facto* principles, apply new standards in the now-judicially-approved "new test" of obscenity[11] to earlier offenses in determining the sufficiency of the statutory language to warn the average person of common intelligence as to what constitutes the prohibited offense. This is particularly true of "(c)" of the test in *Miller* as to "literary, etc. value". It may or may not be true of (a) and (b) in view of our statutory language and its construction as it may have been published as notice to an offender on the date of the offense in question.

Sub judice the test set forth in these latest U.S. judicial holdings with respect to "c" ("literary value") as to what now constitutes obscenity was not available on May 5, 1971, as amplifiecation of the notice to appellant of the proscribed conduct; such a modification of the old test in the new holdings cannot now be echoed to the date of the earlier offense.[12] The "old test" *(Memoirs v. Mass.*, 383 U.S. 413, 419 (1966)) that the allegedly obscene matter be "utterly without redeeming social value", must apply in such instance, for such was the test upon which defendant was on notice on the date (May 5, 1971) of the alleged violation. Said former test, then applicable, was correctly applied, however, in the

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[11] "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. Kois v. Wisconsin, supra, 408 U.S. at 230 (1972), quoting Roth v. United States, supra, 354 U.S. at 489 (1957). (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*.

[12] U.S. v. Lang (July 18, 1973), No. 10712-HP-CD, C. Dist. Calif. _____ F.Supp.2d _____.

trial below. Thus there was no error.

We hold that the "test" of what constitutes obscenity for purposes of notice of the proscribed conduct, and the test to be utilized at trial, is that which prevailed under the applicable statute as amplified by authoritative construction published at the time of the offense.[13]

NEW TEST PROSPECTIVE ONLY

As to the constitutional sufficiency of § 847.011 *per se* regarding no specific elaboration on the words obscene, lewd and lascivious, we must take the constitutional view that although there is a new test of obscenity in the aforementioned recent federal opinions, it does not avail us insofar as the sufficiency of the statutory language is concerned for purposes of the earlier offense before us for review. We are, of course, also aware that the U.S. Supreme Court saw fit to visit its new test retroactively as a matter of judicial construction upon its own federal statute, 18 U.S.C. § 1462, as to interstate transportation of obscene material and 19 U.S.C. § 1305(a) prohibiting importation thereof, which statutes are in fact in simpler terms than our own Florida statute. These federal statutes simply prohibit that "which is obscene or immoral."[14] Nevertheless, we do not deem the new U.S. Supreme Court test to be applicable to the earlier offense here on May 5, 1971, as to the change of standards under "c" ("literary value"), because of constitutional *ex post facto* principles which apply.[15]

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[13] State v. Reese, 222 So.2d 732 (Fla. 1969); So. Fla. Art. Theatres v. State ex rel. Mounts, 224 So.2d 706, 709 (Fla. App. 4th, 1969); Collins v. State Beverage Dept., 230 So.2d 613 (Fla. App. 1st, *Sept. 8, 1970*).

[14] U.S. v. Orito, U.S. No. 70-69, Opinion June 21, 1973, _____ U.S. _____; U.S. v. 12 200-ft. Reels of Super 8mm Film, U.S. No. 70-2, Opinion June 21, 1973, _____ U.S. _____.

[15] U.S. Const. 14th amd.; Bovie v. City of Columbia, 378 U.S. 347 (1964); U.S. v. Lang (July 18, 1973), No. 10712-HP-CD, C. Dist. Calif. _____ F.Supp.2d _____.

The later enlightenment afforded by the new test cannot be visited upon the earlier offense to the extent outlined above, to shore up the rule that the statute must be sufficient to place the average person of common intelligence on notice of the proscribed conduct at the time of the offensive action.[16]

PRIOR FLORIDA "JUDICIAL CONSTRUCTION"

The unavailability of the new test, however, in the prosecution of an earlier offense, does not preclude a conviction, nor the upholding of the validity of our Florida statute. For *Miller* has said,

> "As a result, we now confine the permissible scope of such regulation [by the state] to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or *authoritatively construed.*" (emphasis added)

By clear and continuing judicial declarations we have for many years past "authoritatively construed" the statutory language of "lewd and lascivious." We have said in plain, understandable language that these statutory words proscribe "an unlawful indulgence in lust; eager for sexual indulgence; open and public indecency" offensive to others. *Chesebrough v. State*, 255 So.2d 675 (Fla. 1971), cert. den. 406 U.S. 976, catalogues the earlier cases, although it was not decided until December 8, 1971, subsequent to the offense here.

SUFFICIENT NOTICE TO OFFENDER

We hold the language of Fla. Stat. § 847.011 as heretofore authoritatively construed to be sufficient to meet

[16] Franklin v. State, 257 So.2d 21 (Fla. 1971).

the requirements of notice to the person of ordinary understanding, of the conduct proscribed as obscene, lewd and lascivious such as that here involved. Such offender has accordingly had prior notice of our constant, clear judicial determinations with respect to "lewd and lascivious" in the statute.

Former "authoritative constructions" of the statute, announced in prior court decisions, which were of public notice at the time of the offense here, apply and were chargeable to appellant at the time of his offense.[17] The record supports the convictions under these prior applicable judicial interpretations.

The courts have made as clear as reasonably necessary, the test of obscenity, if it is applied with common sense in accordance with facts. There will always be those who contend otherwise, whose only object is to continue their assertion of confusion and ambiguity and who are not really looking for a reasonable test or determination of obscenity but only wish to obscure the issue, to continue a state of confusion in which they may profit or pointlessly project their perfidious pursuit of perplexity.

We have dealt with this matter before in *Chesebrough, supra,* expressly upholding under prior authoritative construction the "lewd and lascivious" terminology of § 800.04 regarding acts in the presence of a minor as not unconstitutionally vague nor void for overbreadth.[18]

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[17] Note 13, *supra.*

[18] We had the subject before us more recently in Witherspoon v. State, 278 So.2d 611 (Fla. 1973), wherein we directly upheld 6-1 the sufficiency of the statutory words "unnatural and lascivious" acts with another person under Fla. Stat. § 800.02 to be sufficient "notice" of the acts proscribed to be secure from a constitutional attack for vagueness.

In Justice Adkins' opinion in *Chesebrough* he refers to the numerous prior holdings with respect to the sufficiency of the statutory terminology of "lewd and lascivious" and refers to other holdings including the crudite opinion of the eminent Appeals Judge Donald K. Carroll of the First District Court of Appeal in *Buchanan v. State*, 111 So.2d 51 (Fla.App.1st 1959), wherein Judge Carroll said in this respect: (p. 57)

> "It would be, of course, difficult or impossible to detail in a statute book all the acts which would constitute lewd and lascivious behavior, but there is a large body of case law on the meaning of the words 'lewd' and 'lascivious' (See, for instance, the numerous decisions under these words in Vol. 24 and 25 of Words and Phrases). Generally speaking, however, these words, when used in a statute to define an offense, usually have the same meaning, that is, *an unlawful indulgence in lust, eager for sexual indulgence.* See McKinley v. State, 33 Okl. Cr.434, 244 p.208. (emphasis added)
>
> "Our Supreme Court has had occasion to define these two words in their various forms in Luster v. State, 23 Fla. 339, 2 So. 690; Pinsen v. State, 28 Fla. 735, 9 So. 706; Holton v. State, 38 Fla. 303, 9 So. 716; Thomas v. State, 39 Fla. 437, 22 So. 725; Penton v. State, 42 Fla. 560, 28 So. 774; Whitehead v. State, 48 Fla. 64, 37 So. 302; Faulkner v. State, 146 Fla. 769, 1 So.2d 857; and Boles v. State, 158 Fla. 220; 27 So. 2d 293." (p. 57).

Chesebrough then further states: (255 So.2d 678)

> "Lewdness, or open and public indecency, were offenses even at common law. The statutes throughout our country have given the term 'lewdness' a broader sense so that it is no longer necessary that such act be committed in a public

> place or in the presence of many people. It has been held sufficient if it is an intentional act of lewdness, offensive to one or more persons present. See 30 Am.Jur.2d, Lewdness, Indecency, etc., § 1. It is well settled that a criminal *state* is *sufficiently certain, though* it may use *general terms, if* the offense is so defined as to *convey to* a *person of ordinary understanding* an adequate description of *the evil intended to be prohibited.* We reject the argument that the statute is void for vagueness and uncertainty." (emphasis added)

Justice Adkins points out in *Chesebrough* that a fair opportunity is afforded upon motion in the trial court to test the legal sufficiency of the particular acts which must be charged as being lewd and lascivious. Thus the defendant can present his challenge to the sufficiency of his alleged acts as being encompassed within or lying without the statutory verbage. If the defendant's alleged acts cannot be said reasonably to fall without the words of the statute as a matter of law, then, as in any other case, upon sufficient facts, a jury will proceed to make the factual determination from all of the evidence in each individual case whether the act or acts alleged (and here whether the films alleged) are in fact lewd and lascivious.

If sexual intercourse between husband and wife in the presence of their child to demonstrate a method of procreation *(Chesebrough)* is lewd and lascivious, then there can be little doubt that the same and worse sexual conduct depicted upon film between those not husband and wife and in the presence of anyone who wishes to see it is quite obviously lewd and lascivious in violation of the statute § 847.011 and any person of ordinary understanding would know it. We so hold.

We do not need to go further in our consideration of earlier judicial determinations in Flordia with respect to public

notice of the offense proscribed by § 847.011. As a matter of interest, however, our Fourth District appears to have considered other, direct judicial pronouncements which would apply to the statute under the *Miller* "judicial construction" rule. In its recent *Papp v. Florida* (Op. filed Aug. 6, 1973), Case No. 70-1077 and 71-917, ____ So.2d ____ (on which we of course do not pass), our Fourth District recognizes this "judicial construction" principle but finds no such construction prior to an earlier offense of June 19, 1969. Subsequently, the same 4th District (Mager, J.) in *Basilone v. State* (No. 72-398, filed Sept. 11, 1973), ____ So.2d ____, confirms this principle and there affirms a 1971 coniction on the basis of prior 1970 *Collins Mitchum v. State,* 251 So.2d 298 (Fla.App.1st 1971), also constitutes a very explicite construction of the statute § 847.011 which leaves no doubt to any potential offender of the proscribed conduct.

Our attention has also been invited to the Aug. 7, 1973, order of the highly respected U.S. District Court Chief Judge Winston E. Arnow, Northern District of Florida, Pensacola Div., in *Pufahl v. Wilson; Pufahl v. Caldwell;* USDC. No. Dist. Fla., Nos. PCA 2623, 2571, and connected cases. Judge Arnow modified his earlier, more restrictive injunction regarding prosecutions on allegedly obscene materials, and, in light of the recent U.S. Supreme Court cases, based his order expressly upon his statement that by those cases "obscenity requirements were substantially changed" and that "other existing state statutes as construed *heretofore* or hereafter, may well be adequate." *Miller v. California,* 21 L.W. 4925, ____ U.S. ____, June 21, 1973, at page 4927. Whether "heretofore or hereafter" constructions apply would seem to us to depend upon whether the offense was before or after the decisional constructions under consideration. In other words, only constructions existing, and therefore chargeable to a defendant, on the date of the alleged offense could constitute notice chargeable to a defendant at that point in time. To do otherwise would be to apply such "law"

(Construction) retroactively in violation of constitutional *ex post facto* principles.

Judge Arnow in *Pufahl* then proceeds to modify his earlier restraining order against prosecution by saying that "Florida, having heretofore given specific definitions of proscribed sexual conduct *through authoritative court construction* of its obscenity laws, should be permitted to proceed with criminal prosecution, subject to the requirements of *Miller*, for violations occurring *subsequent* to Florida's authoritative constructions of its law." (emphasis added)

In Judge Arnow's opinion are noted the two Florida decisions of *Collins v. State Beverage Dept.*, 239 So.2d 613 (Fla.App.1st 1970), and *Mitchum v. State*, 251 So.2d 298 (Fla.App.1st 1971), which "supplements by quite explicit authoritative judicial construction" setting forth the proscribed "sexual conduct specifically defined" as *Miller* now requires.

OLD OFFENSE – OLD TEST

One area yet remains, however, that is, the case which involves an offense antedating any "supplementing" constructions which are now by virtue of Miller to be "read into" the statute as notice to an offender. Such a prior case must still, in our view, be tried under the "old" *Roth* or *Roth-Memoirs* test (as the date of offense shall dictate) as the only standard then chargeable to the defendant as to that which he should not violate.

COMMUNITY STANDARDS APPLY

Insofar as community standards *vis a vis* "national" standards contended for by appellant are concerned, this issue has now been settled in favor of contemporary community standards. *Miller v. California*, ____ U.S. ____ (1973); *Kaplan*

v. Cal., ____ U.S. ____ (1973); *Austin v. Mover*, U.S. Sup. Ct. No. 70-35, Opinion June 25, 1973, 93 S.Ct. 3029, reversing U.S. District Court, Middle District of Florida at 319 F.Supp. 457, holding to the contrary. See also *Davison v. State*, 251 So.2d 841 (Fla. 1971), and *U.S. v. Groner*, ____ F.2d ____ (5th Cir. 1973), Opinion May 22, 1973. The able trial judge was correct in applying local community standards in the trial which is the standard set forth in § 847.011(11).

PROMPT DISPOSITION

Finally, the contention that there was not a proper and expeditious determination of the alleged obscenity is refuted by the fact of the immediate availability of a hearing on the obscenity question before the court which was at all times open for such a hearing. Appellant simply did not avail himself of it, apparently preferring protracted procedures and the incidental benefits flowing from pending litigation and injunctions in the federal courts at the time, which allowed his continued showing of the prohibited films and the resulting mounting profits.

We therefore conclude:

1) The obscenity statute § 847.011 is valid and meets constitutional requirements. The challenge (again) of vagueness of the statutory language fails.

2) Authoritative constructions, if published on the date of the offense, apply a) to amplify obscenity statutes for purposes of meeting the new requirement for constitutionality in setting forth specific sexual conduct, and b) to provide the required notice of the proscribed conduct which "must be specifically defined by the applicable law, as written or authoritatively construed." *Miller.*

3) The new U.S. Supreme Court obscenity test applies only prospectively as to (c), the new, modified "value

of the work" aspect of the new test, but may apply retroactively, depending upon the date of the offense, as to (b) of the test if the state law, including its authoritative construction, specifically defines on date of the offense the sexual conduct declared obscene (thus meeting the new standard) and retroactively also as to (a) that "community standards" (already in Fla. statutes) apply.

4) *Sub Judice,* authoritative judicial decisions had been published which placed this defendant on notice of the proscribed conduct[19] and the trial and conviction were pursuant to the more severe test then applying, that the material was "utterly without redeeming social value."[20]

5) We expressly adopt, to apply hereafter,[21] the new *Miller* test of obscenity as defined in *Miller,* to-wit: "obscene material" (or conduct) is

> "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (or)
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals, where such material, taken as a whole, when viewed by the average person applying contemporary community standards, appeals to the prurient interest and lacks serious literary, artistic, political, or scientific value."

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[19] Collins v. State Beverage Dept., 239 So.2d 613 (Fla.App.1st, *September 8, 1970*).

[20] *Roth-Memoirs,* supra.

[21] The same *Miller* test was earlier adopted in *Papp* (4th District) on August 6, 1973.

The "double feature" has ended. The show is over; the verdict is in: Guilty.

We affirm.

CARLTON, C.J., ROBERTS, ADKINS, BOYD and McCAIN, JJ., Concur ERVIN, J., Concurring in part and Dissenting in part with Opinion

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IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Appellee,

v.

EDWARD J. WEDELSTEDT,
DAVID A. CORY, and
WAYNE DAVIS,

Appellants.
Filed December 19, 1973

258
1-56081
Filed Dec. 19, 1973
G.K. Sappenfield
Clerk Supreme Court

Appeal from Cedar Falls Municipal Court, Black Hawk County – Forest E. Eastman, Judge.

Defendants appeal from judgment following overruling of demurrer attacking the constitutionality of Code section 725.3, an obscenity statute. – Reversed.

Donald M. Reno, Jr., of Champaign, Illinois, and David D. Mitchell, of Cedar Rapids, for appellants.

Richard C. Turner, Attorney General, Fred M. Haskins, Assistant Attorney General, and David Dutton, County Attorney, for appellee.

Heard en banc.

MOORE, C.J.

Defendants-appellants seek reversal of their lower court convictions for violation of Code section 725.3, an obscenity statute, first enacted in 1909. They assert the statute is unconstitutional due to vagueness and overbreadth. We agree.

As pertinent here section 725.3 provides:

> "Any person who, as owner, manager, director, or agent, or in any other capacity, prepares, advertises, gives, presents, or participates in any obscene, indecent, immoral, or impure drama, play, exhibition, show, or entertainment, which would tend to the corruption of the morals of youth or others, * * * shall be guilty of a misdemeanor * * *."

I. On May 8, 1972 Cedar Falls police detective, L.W. Young, filed a search warrant application in the Cedar Falls Municipal Court. In addition to Young's evidence the testimony of James Workman, age 17, was taken before Municipal Judge Eastman. Workman stated he had viewed a film in an identified coin-operated machine at the Danish Book World, 1828 Waterloo Road, Cedar Falls, Iowa and that it showed a girl committing acts of sodomy on two males and also showed the girl reading a dirty magazine while masturbating. The Judge issued the requested search warrant for the specific film viewed by Workman. The search warrant was immediately executed and the film seized from the identified machine.

On May 12, 1972, after notice to the proper parties, a hearing was held to determine if the film should be forfeited as obscene material. At that hearing Judge Eastman viewed it. The Judge found the film to be obscene and ordered forfeiture. He provided the film be held as evidence. Defendant Edward J. Wedelstedt, manager, defendants, David A. Cory and Wayne Davis, employees, of Danish Book World, in the search warrant proceeding and subsequent criminal case, contended the film seizure was illegal and unconstitutional because there was no adversary hearing prior to the seizure. They jointly raise that issue by proper assignment of error on this appeal. We first consider that assignment.

Heller v. New York, US, 37 L Ed 2d 745, 93 S Ct 2789, decided June 25, 1973, is dispositive of the constitutional question here raised. The Supreme Court stated:

> "* * * This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. See Times Film Corp. v. Chicago, 365 US 43, 5 L Ed 2d 403, 81 S Ct 391 (1961); Kingsley Books, Inc. v. Brown, 354 US 436, 440-442, 1 L Ed 2d 1469, 77 S Ct 1325 (1957). In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. * * *." (____ US at ____ 37 L Ed 2d at 751, 93 S Ct at 2793).
>
> "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there

is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned." (____ US at ____, 37 L Ed 2d at 754, 93 S Ct at 2794-95).

Regarding the question of determination of probable cause for issuance of a search warrant in State v. Spier, Iowa, 173 N.W.2d 854, 859, we say:

> "Thus a magistrate is required to make an objective determination of the factual situation presented to him on oath or affirmation, mere subjective findings or conclusions of an applicant-officer being insufficient and of no probative value. See Beck v. Ohio, supra, at 379 U.S. 97, 85 S.Ct. 229."

In this case the neutral magistrate did not issue the search warrant based on probable cause until after taking the evidence of Workman in addition to that of officer Young.

Under the record, the holding in Heller v. New York, supra, renders untenable defendants' contention the film seizure was illegal and unconstitutional.

II. On May 9, 1972, preliminary informations were filed charging Wedelstedt, Cory and Davis with violation of

Code section 725.3. County attorney's true informations were filed against each of the three men on June 27, 1972. At defendants' request the three cases were consolidated. After adverse rulings on their joint motions to quash the search warrant and to suppress evidence, defendants were allowed to withdraw their former not guilty pleas and file a joint demurrer. They therein asserted the statute violates both their First (free speech and press and Fourteenth (due process) Amendment rights under the Constitution of the United States. They attacked section 725.3 as unconstituionally vague and overbroad.

The constitutionality of a statute under which a party is charged with a crime may be raised by demurrer. State v. Ramos, 260 Iowa 590, 597, 149 N.W.2d 862, 866; Chicago & N.W.Ry.Co. v. Fachman, 255 Iowa 989, 992, 993, 125 N.W.2d 210, 212.

The demurrer was overruled as to each ground thereof. Defendants refused to enter pleas thereafter but chose to stand on their demurrer. Pursuant to Code section 777.10 the trial court found judgment should be entered against them. Defendants requested immediate sentencing. Wedelstedt was sentenced to six months in the county jail and fined $1000. Cory and Davis were each fined $500. At their request defendants' appeal have been consolidated.

The constitutionality of section 725.3 is for the first time being challenged in this court. However, during the last two decades the United States Supreme Court in many decisions involving similar state obscenity statutes have declared them unconstitutional in violation of the First and Fourteenth Amendments. The vexing problems involved are clearly demonstrated by the lack of uniformity of opinions by the members of the court.

During the last fifteen years the Supreme Court failed to file a clear majority holding until the lead case of Miller v.

California, US , 37 L. Ed. 2d 419, 93 S. Ct. 2607 and companion cases of Paris Adult Theatre I v. Slaton, US , 37 L. Ed. 2d 446, 93 S. Ct 2628; Kaplan v. California, US , 37 L Ed 2d 492, 93 S. Ct. 2680; United States v. 12 200-Ft. Reels, US , 37 L Ed 2d 500, 93 S. Ct. 2665; and United States v. Orito, US , 37 L Ed 2d 512, 93 S. Ct. 2674, all decided June 21, 1973. By five to four holdings on June 21, the court arrived at standards for testing the constitutionality of state legislation regulating obscenity.

Citation and discussion of pre-Miller opinions are found therein. See also Annot., 5 A.L.R.3d 1158, Modern Concept of Obscenity, and 21 Drake L. Rev. 314, (January 1972) , The Status of Iowa's Obscenity Laws. Repetition here would unduly lengthen this opinion.

We are bound by the latest pronouncements of the Supreme Court bearing on First and Fourteenth Amendment rights. We therefore quote extensively from Miller:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois v. Wisconsin, 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245 (1972). United States v. Reidel, 402 US 351, 354, 28 L Ed 2d 813, 91 S Ct 1410 (1971). Roth v. United States, 354 US 476, 485, 1 L Ed 2d 1498, 77 S Ct 1304 (1957). 'The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted].' Breard v. Alexandria, supra, 341 US 622, at 642, 95 L Ed 1233, 71 S Ct 920, 35 ALR 2d 335 (1951), and case cited. See Times Film Corp. v. Chicago, 365 US 43, 47-50, 5 L Ed 2d 403, 81 S Ct 391 (1961); Joseph Burstyn, Inc. v. Wilson, supra, 343 US at 502, 96 L Ed 1098 (1952). We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See interstate Circuit, Inc. v. Dallas, supra, 390 US, at

682-685, 20 L Ed 2d 225 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 US, at 230, 33 L Ed 2d 312 (1972), quoting Roth v. United States, supra, 354 US, at 489, 1 L Ed 2d 1498 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the *'utterly* without redeeming social value' test of Memoirs v. Massachusetts, supra, 383 US, at 419, 16 L Ed 2d 1 (1966); that concept has never commanded the adherence of more than three Justices at one time [US, at , 37 L Ed 2d at 429, 93 S Ct at 2613-2614.] If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct any independent review of constitutional claims when necessary. See Kois v. Wisconsin, supra, 408 US, at 232, 33 L Ed 2d 312 (1972); Memoirs v. Massachusetts, supra, 383 US at 459-460, 16 L Ed 2d 1 (1966) (Harlan, J.,

dissenting); Jacobellis v. Ohio, 378 US 184, 204, 12 L Ed 2d 793, 84 S Ct 1676 (1964) (Harlan, J., dissenting); New York Times Co. v. Sullivan, 376 US 254, 284-285, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR 2d 1412 (1964); Roth v. United States, supra, 354 US, at 497-498, 1 L Ed 2d 1498 (1957) (Harlan, J., concurring and dissenting).

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

((b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." US, at , 37 L Ed 2d at 430, 431, 93 S Ct at 2614-15.

With these pronouncements in mind we consider defendants' attack on Code section 725.3 as being unconstitutionally vague and overbroad.

Vagueness and overbreadth are two separate matters although closely related. In Zwickler v. Koota, 389 US 241, 249-250, 19 L Ed 2d 444, 451, 88 S Ct 391, 396, the court distinguishes one from the other:

"* * * Appellant's challenge is not that the statute is void for 'vagueness,' that is, that it is a statue 'which either forbids or requires the doing of an act in terms so vague that men of common intelligence must

> necessarily guess at its meaning and differ as to its application ....' Connally v. General Construction Co., 269 US 385, 391, 70 L Ed 322, 328, 46 S Ct 126. Rather his constitutional attack is that the statute, although lacking neither clarity nor precision, is void for 'overbreadth,' that is, that it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. * * *.'"

For our most recent definition of overbreadth see State v. Farrell, Iowa, 209 N.W.2d 103, 108.

All authorities agree that a statute which is vague and overbroad within the above definitions is unconstitutional. The State makes no contention otherwise.

III. We first consider the vagueness issue as raised by defendants. They are charged with participating in the exhibition of an "obscene" film which tended to corrupt the morals of youth.

"Obscene" as used in section 725.3 is not specifically defined as required by Miller. The statute fails to give fair notice to the average person of what is prohibited. It has not been authoritatively construed and as we point out, infra, we must decline to do so. We therefore hold the statute is unconstitutionally vague.

IV. We also hold section 725.3 in unconstitutionally overbroad. It is in direct conflict with the basic guideline established in Miller: "(a) whether '*the average person,* applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." (Our emphasis). The provision in section 725.3, "which shall tend to the corruption of the morals of youth or others" is

overbroad. It limits the free speech and press rights of all persons to matters which may tend to corrupt youth or others – perhaps the most susceptible person. A similar statute was declared unconstitutional in Butler v. Michigan, 352 US 380, 1 L Ed 2d 412, 77 S Ct 524.

V. The State virtually admits in argument the statute is vague and overbroad. It is urged we construe the statute to include perhaps the suggested specific examples stated in Miller to eliminate vagueness and to somehow adopt the average-person criterion.

This would require adding to and striking legislative provisions of the statue. Well-established rules of statutory construction prohibit our doing so. No court under the guise of construction may extend, enlarge, or otherwise change the terms and meaning of a statute. State v. Prybil, Iowa, 211 N.W.2d 308, 311; Northern Natural Gas Company v. Forst, Iowa, 205 N.W.2d 692, 696; McGuire v. Fulton, Iowa, 179 N.W.2d 508, 510; Bergeson v. Pesch, 254 Iowa 223, 227, 117 N.W.2d 431, 433; 82 C.J.S., Statutes, section 312.

It is not our function to rewrite the statute. Snook v. Herrmann, Iowa, 161 N.W.2d 185, 190. In Consolidated Freightways Corp. v. Nicholas, 258 Iowa 115, 122, 137 N.W.2d 900, 905, we say:

> "If changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation."

The proper forum for the difficult task of reconstructing Code section 725.3 and our other obscenity statutes is thy legislature. Present and future public policy is involved. Modern enlightened legislation is needed. Obscenity is a complex and difficult socio-legal problem.

As pointed out in Miller: "State statutes designed to regulate obscene materials must be carefully limited." 37 L Ed 2d at 430, 93 S Ct at 2614. To pass constitutional muster the general guidelines of Miller must be followed.

The judgment entered against each defendant herein is reversed.

REVERSED.

All Justices Concur.

SUPREME COURT OF LOUISIANA

NO. 53,985

STATE OF LOUISIANA
VERSUS
SHREVEPORT NEWS AGENCY, INC.

ON WRITS OF CERTIORIA, PROHIBITION AND MANDAMUS TO THE FIRST JUDICIAL DISTRI CT COURT, PARISH OF CADDO, HONORABLE JOHN F. FANT, JUDGE.

Filed Monday Dec. 3, 1973

BARHAM, Justice.

The State filed 20 bills of information, each charging the defendant with a violation of the Louisiana obscenity statute, R.S. 14:106 A (2) and (3). The State had seized twenty magazines and the seizure of each magazine constitutes the offense in the twenty separate bills of information. The defendant filed a motion to quash and a supplemental motion to quash, alleging in part that the bills

of information were filed under statutory provisions which are unconstitutional and which deprive defendant of its constitutional rights under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Defendant alleges that the statute is so vague and indefinite that it must fall since it does not give notice of the criminal activity intended to be proscribed. The defendant further contends that recent decisions of the United States Supreme Court have made the statute unconstitutional on its face for lack of specificity.

The defendant here is charged in each bill of information with violating R.S. 14:106 A (3) by intentionally possessing, with intent to sell, exhibit, give, and advertise, a magazine which is obscene as defined by R.S. 14:106 A (2). R.S. 14:106 A (2) and (3) reads as follows:

"Obscenity is the intentional:

* * *

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper * * *.[1]

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person."

In 1957 in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, the United States Supreme Court

[1] As amended by Act 199 of 1960

held that obscenity is not within the area of constitutionally protected speech or press. Additionally, although Roth dealth with obscenity in the abstract, certain safeguards or standards were required of local statutes for the judging of obscenity in order that the statutory regulation not impinge upon First Amendment rights.

First, the Court differentiated between sex and obscenity and declared that sexual material which could be declared obscene was material whose *dominant theme taken as a whole appeals to prurient interests.* Roth further discarded the concept of the impact of the material upon particularly susceptible persons and looked rather to the *effect of the material upon the average person applying contemporary community standards.*

The Louisiana Legislature, apparently reacting to the Roth decision, amended R.S. 14:106 (2) to read as above quoted, in 1960. In State v. Roufa, 241 La. 474, 129 So.2d 743 (1961) this Court held the particular section of the statute we consider to be constitutional, relying upon Roth v. United States. In Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), the court transformed Roth's statement that *obscenity* is "utterly without redeeming social importance" into a third safeguard. The court stated:

> "Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, *for a work cannot be proscribed unless it is 'utterly' without social importance."* (Emphasis here and elsewhere supplied).

See also Kingsley International Pictures Corporation v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959).

Nine years after Roth, the Supreme Court reiterated the third safeguard for testing the constitutionality of a local statute regulating obscenity in *A Book Named: "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), (hereinafter referred to as "Memoirs"). There the court below had held under the "social importance test" of Jacobellis that the material which appeals to prurient interests and is patently offensive need not be "unqualifiedly worthless before it can be deemed obscene". In Memoirs, the Supreme Court stated, "* * * A book cannot be proscribed unless it be found to be *'utterly' without redeeming social value*. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive."

In State v. Henry, 250 La. 682, 198 So.2d 889 (1967),[2] our Court considered the constitutionality of R.S. 14:106 (2) again. The Court noted that the legislature had adopted the two safeguards required under the Roth decision. It did not meet the question of whether or not the statute met the third standard required under Jacobellis and Memoirs. However, the court did cite the companion cases to Memoirs, Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed.2d 31 (1966), and Mishkin v. New York, 383 U.S. 502, 86 S. Ct. 958, 16 L.Ed.2d 56 (1966), but for the holding that obscenity can be restricted and controlled without violating the First Amendment.

In State v. Gay Times, Inc., 274 So.2d 162 (La. 1973), the majority of this Court stated, in light of Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515

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[2] Reversed by the United States Supreme Court in per curiam, "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is granted and the judgment is reversed. Redrup v. New York, 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414." Henry v. Louisiana, 392 U.S. 655, 88 S.Ct. 2274, 20 L.Ed.2d 1343.

(1967), and the varying views of the several Justices of the United States Supreme Court in other opinions: "* * * Consequently, there is no easily ascertainable standard by which we may judge the constitutionality of the Louisiana obscenity statute as applied to moving picture film." The Court then held: *"Under the Roth standards,* we find the second section of R.S. 14:106 to be violative of neither the First and Fourteenth Amendments to the United States Constitution nor Art. I, § 10 of the Louisiana Constitution of 1921."

At the time of the trial court's rulings on this defendant's motions it could be stated unequivocally that *Louisiana's highest court* had interpreted and applied the obscenity statute to prohibit the sale of *all* "lewd, lascivious, filthy and sexually indecent" expression within the ambit of the Roth safeguards. A perusal of the evoluation of the obscenity statute makes it clear that *our legislature* intended to prohibit the display and distribution of *all* "lewd, lascivious, filthy or sexually indecent" matter or materials which could constitutionally be prohibited. When the trial court ruled upon the defendant's motions to quash on the grounds of unconstitutionality, it was correct under the interpretation and application of that statute by the highest court of this state. However, the United States Supreme Court handed down five cases concerning obscenity statutes during its last term. We must decide the constitutionality of our statute under the latest pronouncement by the United States Supreme Court. The principal case which affects our decision is Miller v. California, ____ U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).[3]

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[3] See also: Paris Adult Theatre I v. Slaton, ____ U.S. ____ 93 S. Ct. 2628, 37 L.Ed. 2d 446 (1973); U.S. v. Orito, ____ U.S. ____, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); Kaplan v. California, ____ U.S. ____, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); U.S. v. 12 200 Ft. Reels of Super 8mm. Film, et al., ____ U.S. ____, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

Before the Miller decision, material which was "lewd, lascivious, filthy or sexually indecent" was obscenity and without First Amendment protection, if it were established that:

(A) The dominant theme of the material taken as a whole appealed to the prurient interest in sex;

(B) The material was patently offensive because it offended contemporary community standards relating to the description or representation of sexual matters;

(C) The material was utterly without redeeming social value.

Miller v. California reviewed a California statute which had been interpreted under the Memoirs test in the very same light as the criteria above enumerated. Chief Justice Burger, writing for the majority, stated that the case they reviewed was tried in the lower court on the theory that the statute incorporated the three-pronged Memoirs test. He wrote:

"* * * But now the 'Memoirs' test has been abandoned as unworkable by its author and no member of the Court today supports the 'Memoirs' formulation."

The United States Supreme Court repudiated the Memoirs test which had been incorporated in part into our law by statute and to some extent by court interpretation. In repudicating the Memoirs test, the court stated that one part of the test:

> "* * * called on the prosecution to prove a negative, i.e., that the material was *'utterly* without redeeming social value' – a burden virtually

impossible to discharge under our criminal standards of proof."

The majority further found that the Roth and Memoirs test had never been approved by a majority of the court. As the United States Supreme Court in Miller laid down new tests for determining obscene material which could statutorily be controlled, it said:

"* * *

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. *State statutes designed to regulate obscene materials must be carefully limited.* See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law, as written or authoritatively construed."*

The court then laid down the constitutional test for local control of obscenity by statute. It said:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct *specifically defined by the applicable state law,* and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The court said further:

"If a state law that regulates obscene material is thus limited, as written or construed * * *.

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete *legislative efforts.*"

"* * *

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials *unless these materials depict or describe patently extensive 'hard-core' sexual conduct specifically defined by the regulating state law, as written or construed.* We are satisfied that these *specific prerequisites* will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

The above is an accurate summary of the totality of the guidelines laid down in Miller v. California for testing the constitutionality of a statute. The court additionally gave to the state legislatures examples of what activity or matter could be declared obscene, if done so with specificity.

The remainder of the opinion deals with the test of "community standards" which has no application to the issue before us.

Thus, it must be obvious, even to laymen and surely to this Court, that R.S. 14:106(2) does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.

We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. This urging comes because of a statement in Footnote 6 of the Miller opinion:

"* * * Other existing state statutes, as construed heretofore or hereafter, may well be adequate."

But the body of the opinion, where the examples are given, states emphatically that it is not a function of that court, and certainly we hold that it is not a function of our Court, to propose new regulatory schemes. The court stated:

> *"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts.* It is possible, however, to give a few plain examples of *what a state statute* could define for regulation under the second part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

In United States v. 12 200 Ft. Reels of Super 8mm. Film, et al., ____ U.S. ____, 93 S.Ct. 2665 37 500 (1973), the Chief Justice, who authored all five of the opinions, stated in Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe "obscene", "lewd", "lascivious", "filthy", "indecent", or "immoral", for the purpose of reviewing the constitutionality of the federal statutes, 19 U.S.C. § 1305 (a) and 18 U.S.C. § 1462, as being limited to "specific - hard-core" sexual conduct given as examples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. Our Court may interpret a statute, but it cannot re-write a statute in order to hold it constitutional. The

Louisiana Legislature intended to regulate all material which could constitutionally be declared obscene. Certainly, the legislature intended to prohibit more than the two examples given in the Miller opinion.

Our Court has, in a long line of cases, held that we must strictly consider all criminal and penal statutes as stricti juris, resolving ambiguities in favor of the accused. State v. Christine, 239 La. 259, and cases cited therein at page 290, 118 So.2d 403, 414 (1960). The Court said there that our courts have "* * * *consistently refused to usurp the prerogatives of the legislature by supplying either the definition or essential elements thereof that have been omitted in the drafting of the statute* * * *."

Recently, in State v. Brown, 282 So.2d 707 (La. 1973), Mr. Justice Marcus, writing for the majority, cited State v. Ganch, 263 La. 251, 268 So.2d 214 (1972), and State v. Adams, 263 La. 286, 268 So.2d 228 (1972), per curiam opinions of this Court which had declared unconstitutional R.S. 14:103 A (7) and R.S. 14:103 A (2). Mr. Justice Marcus therein declared R.S. 14:103 B (2)(e) unconstitutional and quoted approvingly from the per curiam in Ganch and from a recent opinion of the United States Supreme Court:

> "The statute on its face is susceptible of application to expression protected by the Louisiana Constitution (Art. 1, Sec. 3) and the First Amendment of the U.S. Constitution. *Since we have not heretofore limited the statute in application to expression which is not constitutionally protected, it must fall as being overly broad in contravention of the Louisiana and United States Constitutions.*
>
> "The United States Supreme Court in Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), stated:

> "The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.' Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942). * * * In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. * * *"

The United States Supreme Court in Miller v. California has made R.S. 14:106 (2) unconstitutional. It has required the state to draft a statute with specificity because "* * * these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution * * *." Our statutes is totally lacking in specificity which would comply with the requirements of Miller v. California. Mr. Justice Dixon, who wrote the majority opinion in State v. Gay Times, Inc., supra,[4] joins with the rest of the majority here in the opinion that we are now required, under Miller, to overrule the holding in that opinion. We reject any theory that we can authoritatively construe our criminal statute regulating obscenity so as to make it constitutional under the United States Supreme Court holding in Miller v. California. It is for the legislature to design a statute or statutes which meet the tests and formulations set forth by that court.

In summary, we conclude that R.S. 14:106(2), as considered and interpreted in light of Miller v. California, is over-broad, too general, and without the required specificity

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[4] On November 5, 1973, the United States Supreme Court, in Gay Times, Inc. v. Louisiana, No. 73-4 on its docket, vacated our judgment in State v. Gay Times, Inc., 274 So.2d 162 (la. 1973), and remanded the case for reconsideration in light of Miller v. California, and others.

to withstand the constitutional attack under the United States Constitution, First and Fourteenth Amendments, and our Constitution Article 1, Sections 2 and 3. We conclude that while the United States Supreme Court has given examples of what it believes may be controlled as obscenity without violating the First Amendment right of free speech, it would be an unconstitutional usurpation of the legislative function for us to engraft these limiting two examples into a broad, general statute which clearly conveys the obvious legislative intention to prohibit many other "offensive representations or descriptions".

The United States Supreme Court pronouncement in Miller v. California has made our statute unconstitutional. It is the legislative function to cure the defects in the statute in the manner and to the extent which they believe the people of this state desire within the constitutional limits now newly pronounced by the United States Supreme Court.

Pursuant to the clear pronouncement by the United States Supreme Court, we declare R.S. 14:106 A (2) and (3) to be unconstitutional. The trial court judgment is reversed. The motions to quash are sustained. The defendant is ordered discharged.

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SUPREME COURT OF LOUISIANA

NO. 52,489

STATE OF LOUISIANA
VERSUS
RICHARD LEE McNUTT

APPEAL FROM THE CRIMINAL DISTRICT COURT,
PARISH OF ORLEANS, SECTION "E";
THE HONORABLE RUDOLPH F. BECKER, JR., JUDGE

Filed Monday, Dec. 3, 1973

BARHAM, Justice.

Defendant, McNutt, was charged in four counts of a bill of information with violating the obscenity statute, R.S. 14:106(2), and was found guilty, after a trial before a judge, of three of the four counts.[1] Defendant was sentenced to pay a fine of $500.00 or to serve six months in the parish jail as to each of the three counts, all sentences to run concurrently. Additionally, the court assessed court costs in the amount of $28.00, in default of payment of which the defendant is to serve an additional 30 days in the parish prison.

Defendant's Bill of Exceptions No. 3 was reserved to an adverse ruling on defendant's motion to quash the indictment. Among other grounds, the motion alleges that the statute under which defendant was charged is unconstitutional in violation of the First and Fourteenth Amendments of the Constitution of the United States and Article 1, Sections 2 and 3 of the Constitution of the State of Louisiana.

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[1] The trial court, upon motion of defense counsel, granted a directed verdict as to Count One of the bill of information because the State failed to offer into evidence the magazine "Cherry" named in that count.

The defendant here is charged with sale of magazines in violation of Louisiana's obscenity statute, R.S. 14:106:

"Obscenity is the intentional:

* * *

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper * * *."[2]

At the time of the trial of this defendant it could be stated unequivocally that *Louisiana's highest court* had interpreted and applied the obscenity statute to prohibit the sale of *all* "lewd, lascivious, filthy and sexually indecent" expression within the ambit of the safeguards set forth in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). A perusal of the evolution of the obscenity statute makes it clear that *our legislature* intended to prohibit the display and distribution of *all* "lewd, lascivious, filthy or sexually indecent" matter or materials which could constitutionally be prohibited. When the trial court ruled upon the defendant's motion to quash on the grounds of unconstitutionality, it was correct under the last interpretation and application of that statute by the highest court of this state. However, while this matter was pending on appeal, the United States Supreme Court handed down five cases concerning obscenity statutes. We must decide the constitutionality of our statute under the latest pronouncement by the United States Supreme Court. The

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[2] As amended by Act. 199 of 1960.

principal case which affects our decision is Miller v. California, ____ U.S. ____ , 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).[3]

We have this day, in the case of State of Louisiana v. Shreveport News Agency, Inc., No. 53,985, ____ So.2d ____ (La. 1973), determined that the United States Supreme Court's pronouncement in the Miller case has made our statute unconstitutional.

For the reasons assigned in that case, and pursuant to the clear pronouncement by the United States Supreme Court, we have declared R.S. 14:106 (2) to be unconstitutional. The conviction and sentence of the defendant are set aside and the defendant is ordered discharged.

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[3] See also: Paris Adult Theatre I v. Slaton, ____ U.S. ____, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); U.S. v. Orito, ____ U.S. ____, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); Kaplan v. California, ____ U.S. ____, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); United States v. 12 200 Ft. Reels of Super 8mm. Film, et al., ____ U.S. ____, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 4208-N

UNITED ARTISTS CORPORATION,
a Corporation,
Plaintiff,
v.
E. L. WRIGHT, JR., Individually,
and as Chief of Police, City of
Montgomery, Alabama,
Defendant,
JAMES H. EVANS, as District
Attorney for the Fifteenth
Judicial Circuit of the State
of Alabama; ROBERT L. DORROUGH
and ARDITH C. DORROUGH,
Defendants-
Intervenors.

ORDER AND INJUNCTION
(Filed January 5, 1974)

Upon consideration of the opinion of this Court made and entered in this cause this date and for the reasons stated therein, it is the ORDER, JUDGMENT and DECREE of this Court:

1. That Sections 374(16j)-(16o) of Title 14 of the Code of Alabama, 1971 Supplement, be and said sections are hereby declared void as being violative of the Constitution of the United States.

2. That the defendant Chief of Police of the City of Montgomery, defendant District Attorney for the Fifteenth Judicial Circuit of the State of Alabama, and all others

authorized to issue notices or to institute prosecutions under ALA. CODE tit. §§ 374(16j)-(16o) (Supp. 1971), be and each is hereby enjoined from the enforcement of said statute.

Done, this the 5th day of January, 1974.

/s/ Rives
UNITED STATES CIRCUIT JUDGE

/s/ Johnson
UNITED STATES DISTRICT JUDGE

/s/ Varner
UNITED STATES DISTRICT JUDGE

OPINIONS OF JOHNSON

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges. JOHNSON, District Judge:

Plaintiff, United Artists Corporation, brings suit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, seeking to have Chapter 64C of the Alabama obscenity statute, ALA. CODE tit. 14, §§ 374(16j)-(16o) (Supp. 1971), declared unconstitutional on its face and as applied. The constitutionality of a statute of statewide application being brought into question, a three-judge district court was convened pursuant to 28 U.S.C. § 2284. The case is submitted upon the pleadings, affidavits, briefs and depositions filed in this cause.

I. *Facts*

Plaintiff, a film distributor operating nationally, is the owner and distributor of the motion picture "Last Tango in Paris." Defendant E. L. Wright, Jr., is the Chief of Police of

the City of Montgomery, Alabama, and is sued in his capacity as such and also individually. Intervening defendant James H. Evans is District Attorney for the Fifteenth Judicial Circuit of the State of Alabama. Intervening defendants Robert L. and Ardith C. Dorrough are citizens of Montgomery, Alabama.

Plaintiff entered into an agreement with a local movie theater for the exhibition of the film "Last Tango in Paris." On October 11, 1973, without any prior administrative or judicial proceeding before a neutral party, the exhibitor received a written notice from defendant Wright that there was reasonable cause to believe that the exhibition of that film would constitute a violation of the Alabama laws regulating obscenity. The written notice pointed out that the exhibitor could seek a declaratory judgment in the proper state circuit court on the obscenity *vel non* of the film. Defendant Wright, in his written notice, informed the exhibitor that "the exhibition of this movie prior to obtaining the declaratory judgment might result in prosecution." The exhibitor then declined to show "Last Tango in Paris" in his theater. Thereafter plaintiff brought this action, in which he alleges the unconstitutionality of ALA. CODE tit. 14, §§ 374(16j)-(16o) (Supp. 1971) on its face and as applied.

II. *Standing*

Defendants contend that plaintiff lacks standing to prosecute this action because it has not been harassed, arrested, indicted or prosecuted in connection with the subject matter of this action. Plaintiff, however, is in privity of contract with its local exhibitor. Plaintiff's exhibitor has received an explicit threat or warning that, if it proceeds to show the film in question here, prosecution might well ensure. The exhibitor, on account of the threat of prosecution, declines to exhibit the film. Plaintiff alleges that as a direct and proximate result of this written threat, pursuant to the statute alleged to be unconstitutional, it stands to lose approximately $20,000 in anticipated revenues. Whatever

value might be put upon First Amendment rights in this case, it is clear that plaintiff alleges *financial* injury in fact sufficient to confer standing. The alleged financial injury is proximately caused by the action of defendant Wright acting pursuant to the challenged statute. In such cases as this, it is necessary that distributors as well as exhibitors have standing. *Interstate Circuit, Inc., v. Dallas,* 390 U.S. 676, 691 n.22 (1968).

Furthermore, the threat of arrest in this case is not "imaginary and speculative." *Younger v. Harris,* 401 U.S. 37, 42 (1971). The existence of a genuine threat of arrest suffices to confer standing. While it is true that defenses premised upon the First Amendment could be raised in a criminal prosecution resulting from an exhibition of "Last Tango in Paris," there is no requirement that citizens must "await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton,* 410 U.S. 179, 188 (1973). *Accord, Wulp v. Corcoran,* 454 F.2d 826, 880 (1st Cir. 1972); *Thoms v. Smith,* 334 F. Supp. 1203, 1207 (D. Conn. 1971) (3-judge court), *aff'd sub nom. Thoms v. Heffernan,* 473 F.2d 478 (2d Cir. 1973); *Anderson v. Vaughn,* 327 F. Supp. 101, 103 (D. Conn. 1971) (3-judge court). Plaintiff clearly has standing in this cause, and its claim is otherwise justiciable.

III. *Comity – The Younger Doctrine*

Defendants contend that this Court is precluded by the policy of comity from deciding this case on the merits. Certainly if there were a pending state criminal prosecution against plaintiff, this Court would possibly be precluded from reaching the merits. *Younger v. Harris,* 401 U.S. 37, 54 (1971); *Samuels v. Mackell,* 401 U.S. 66, 72-73 (1971); *Perez v. Ledesma,* 401 U.S. 82, 83 (1971). A similar result could obtain if there were a pending civil process which leads to, or is a part of, a criminal prosecution. *Palaio v. McAuliffe,* 466 F.2d 1230, 1231-32 (5th Cir. 1972).

In this case, the letter from defendant cannot be said to constitute a pending criminal prosecution; nor can it be characterized as a pending civil process which leads to, or is a part of, a criminal prosecution. The notice letter here involved is, quite simply, a threat of prosecution. When a state criminal prosecution is only threatened, and not pending, many cases hold that the *Younger* doctrine does not bar a consideration on the merits of a cause. Courts recognize two reasons for so holding. First is the language in *Younger* nothing that

> [t]here may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.

Younger v. Harris, 401 U.S. 37, 53 (1971). Applying this language, some courts have held that the absence of a pending prosecution, the imminence of a threatened prosecution, and a First Amendment challenge combine to form "extraordinary circumstances" within the meaning of *Younger*. *Wulp v. Corcoran*, 454 F.2d 826, 831 n.6 (1st Cir. 1972); *Anderson v. Vaughn*, 327 F. Supp. 101, 103 (D. Conn. 1971) (3-judge court).

Second, some courts have applied in cases like this what is termed a "pending/threatened" distinction, in holding that the *Younger* doctrine is inapplicable to situations in which a state prosecution is merely threatened. *Thoms v. Heffernan*, 473 F.2d 478, 483 (2d Cir. 1973); *Lewis v. Kugler*, 446 F.2d 1343, 1347 (3rd Cir. 1971); *Hull v. Petrillo*, 439 F.2d 1184, 1186 n.1 (2d Cir. 1971). The United States Court of Appeals for this circuit has adopted a further refinement of the pending/threatened distinction. If a state statute is attacked upon grounds of its unconstitutionality *as applied*, and no prosecution is pending, plaintiff must allege and prove bad faith prosecution or harassment. *Becker v.*

Thompson, 459 F.2d 919, 923 (5th Cir. 1972), *cert. granted sub nom. Steffel v. Thompson*, 410 U.S. 953 (1973). *Accord, Milner v. Burson*, 470 F.2d 870, 874 (5th Cir. 1972). However, when a plaintiff attacks the *facial* constitutionality of a state statute, and there is no pending state criminal prosecution, a three-judge court is not foreclosed by *Younger* from a decision on the merits, even absent an allegation of bad faith or harassing official conduct. *Jones v. Wade*, 479 F.2d 1176, 1182 (5th Cir. 1973).

Applying these principles to this case, this Court holds that plaintiff's claim is not barred by the doctrine of comity, since a prosecution is merely threatened and since plaintiff alleges the unconstitutionality of the obscenity statute upon its face. Since it is not necessary for this Court to consider the unconstitutionality of the statute as applied (*i.e.*, the obscenity *vel non* of the movie), we do not need to consider whether there was in this case bad faith or harassing conduct by defendants. And, since we recognize and apply the "pending/threatened" distinction as declared by the Fifth Circuit, it is not necessary to consider the applicability of the "extraordinary circumstances" exception to *Younger*.

IV. *Abstention*

Defendants also contend that this Court should, by reason of the abstention doctrine, decline to decide this case upon the merits. The doctrine of abstention, first espoused in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), is a judge-made doctrine to be used only in very limited circumstances. Congress has endowed the federal judiciary with power to render declaratory judgments. When a plaintiff chooses a federal forum for the adjudication of his case, the federal court is not obliged to dismiss the case merely because plaintiff could have brought his action in a state court. *Kusper v. Pontikes*, _____ U.S. _____ (1973); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972). To dismiss this case at this point, and to send plaintiff into state court,

would cause a delay which would "itself effect the impermissible chilling of the very constitutional rights [plaintiff] seeks to protect." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

The strongest case for abstention exists when there is a possible limiting construction which could be given a state statute by a state court, in order to avoid most or all of the constitutional problem. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972); *Wulp v. Corcoran*, 454 F.2d 826, 833 (1st Cir. 1972); *Lewis v. Kugler*, 446 F.2d 1343, 1346 (3rd Cir. 1971). In this case, there is no possibility of such a construction. The procedural portions of the statute here under attack contain defects which would not be eliminated by a narrow construction. That being so, there appears to be no reason for the application of the doctrine of abstention. This Court is mindful of the pendency in the Alabama Supreme Court of several cases in which there are, *inter alia*, challenges to the constitutionality of the Alabama obscenity statutes. However, in those cases defendants were prosecuted criminally. Since criminal prosecutions present issues altogether different from instances of prior restraint, the pendency of the cases in the Alabama Supreme Court does not have sufficient bearing upon this case to warrant abstention. Plaintiff's choice of a federal forum will be honored, and this case will be decided upon its merits.

V. *Procedure under the Alabama Obscenity Statute*

Plaintiff asserts that the statute in question sets up a system of prior restraints upon First Amendment freedoms and that the statute fails to provide the safeguards which are constitutionally required under a system of prior restraint.

Chapter 64C of the Alabama obscenity statute, under attack here, provides that, prior to the commencement of a prosecution, one of several governmental officials must serve

upon an exhibitor "prior written notice that there is reasonable cause to believe the material" in question is in violation of the obscenity statute. ALA. CODE tit. 14, § 374(16m)(a) (Supp. 1971). Then, the person receiving notice has 30 days within which "to file an appropriate action for declaratory judgment to determine the validity of such written notice." ALA. CODE tit. 14, § 374(16m)(c) (Supp. 1971).

Central to a decision in this case is the issue of whether or not this statutory "warning" constitutes a prior restraint. Clearly the warning scheme is not an absolute prohibition against the showing of movies, as an injunction would operate in similar circumstances. However, a statutory scheme need not be published under the rubric "Censorship Statute" before it is considered an effective prior restraint. Courts must not be blind to the effect of a statute. One clear effect of this particular scheme is that the notice operates almost as effectively to bar movie exhibitions as an injunction would operate. Without such a notice exhibitors might well be willing to show movies which are arguably protected by the Constitution. However, when the government goes to the trouble to warn an exhibitor that criminal prosecution might ensue upon exhibition of a movie, few would dare ignore the warning. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around. . . ." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963). Such a system of threatened prosecution "can constitute an all too effective prior restraint." *Poulos v. Rucker*, 288 F. Supp. 305, 310 (M.D. Ala. 1968). Therefore, this Court holds that Chapter 64C of the Alabama obscenity statute, ALA. CODE tit. 14, §§ 374 (16j)-(16o) (Supp. 1971), is in legal effect a system of prior restraints.

But that holding does not end our inquiry. A system of prior restraints is not necessarily invalid. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961). However, "[a]ny system of

prior restraints of expression comes to ... Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Because of the dangers inherent in the use of prior restraints, courts have established rigorous procedures which must be provided before a prior restraint may be held valid. These procedural safeguards are three in number.

A. *Burden of Proof.* When a system of prior restraints is used by the government to control speech or the press, the burden of proving that the material is unprotected must rest upon the censor. *Blount v. Rizzi*, 400 U.S. 410, 417-18 (1971); *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965); *Cinema Classics v. Busch*, 339 F. Supp. 43, 50 (C.D.Cal. 1972) (3-judge court); *Studio III, Inc., v. Smith*, 326 F. Supp. 1166, 1169 (S.D. Iowa 1971); *Embassy Pictures Corp. v. Hudson*, 242 F. Supp. 975, 978 (W.D. Tenn. 1965).

Under the Alabama statute, the burden is clearly upon the individual and not the government; when the statutory warning is given, the state need have only "reasonable cause" to believe that the material is obscene. Thereafter, if the exhibitor wishes to obtain a definitive ruling from a court, he himself must bring suit and carry the burden of proof. ALA. CODE tit. 14, § 374(16m)(c) (Supp. 1971). Since the statute *clearly* provides that the burden of bringing suit is upon the exhibitor, there is no reason to abstain in this case to hope for a narrowing construction from the state courts. Such a construction on this issue would have to disregard the plain language of the statute.

B. *Air of Finality to Censor.* The procedures of censorship may not constitutionally lend an air of finality to the action of the censor.

> To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either ... [allow

> exhibition] or go to court to restrain showing the film.

Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

Under the procedural system of this statute, the decision of the official giving notice is for all practical purposes a final decision. The issuance of the warning effectively stops the showing of the film. The state is not required under the Alabama statute to go to court to obtain an injunction after adjudication. The warning is for all intents and purposes a "final" act of censorship and is, therefore, invalid.

C. *Prompt and Final Judicial Determination.* In order to provide a valid prior restraint system, a statutory scheme must provide a prompt final judicial decision. *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 142 (1968); *Grove Press v. City of Philadelphia*, 418 F.2d 82, 90 (3rd Cir. 1969); *Cinema Classics v. Busch*, 339 F. Supp. 43, 50 (C.D. Cal. 1972) (3-judge court); *National Ass'n of Theater Owners v. Motion Picture Comm'n of Milwaukee*, 328 F. Supp. 6, 12 (E.D. Wisc. 1971); *Studio III, Inc., v. Smith*, 326 F. Supp. 1166, 1169 (S.D. Iowa 1971); *Gundlach v. Rauhauser*, 304 F. Supp. 962, 965-66 (M.D. Pa. 1969); *United States v. A Motion Picture Film Entitled "Pattern of Evil,"* 304 F. Supp. 197, 200 (S.D.N.Y. 1965).

Nowhere in the Alabama statute is there a provision for expedited judicial consideration, either at trial or on appeal, of the issue of obscenity. This Court has not been made aware of any authoritative judicial decision of the State of Alabama providing for expedited consideration of civil adjudications of obscenity *vel non* under this statute. Such an adjudication is, therefore, liable to all of the delays which are incident to the bringing of an ordinary civil action. This failing renders the Alabama statute invalid in that respect.

This Court, therefore, finds that the statutory system under which notice or warning is given pursuant to ALA. CODE tit. 14, §§ 374(16m) (Supp. 1971) is unconstitutional because of its procedural defects.

VI. *Unconstitutionality as Applied*

Since the statute is unconstitutional on its face, there is no necessity of determining whether it is unconstitutional as applied, *i.e.*, whether this particular film is obscene. Furthermore, it appears that the *Younger* doctrine as applied in this circuit might preclude such an inquiry, at least absent bad faith prosecution. *Becker v. Thompson*, 459 F.2d 919, 923 (5th Cir. 1972), *cert. granted sub nom. Steffel v. Thompson*, 410 U.S. 953 (1973).

VII. *Separability*

If the "notice" provisions in Chapter 64C of the Alabama obscenity statute are unconstitutional, as we today declare, this Court must determine whether the remainder of the statute must fall also. Principally this means that we must decide whether exhibitors may still be criminally prosecuted despite the invalidity of the notice provisions of Chapter 64C.

If a statute constitutes one inseparable whole, rather than several distinct and separable parts, a declaration of the unconstitutionality of one part must result in the failure of the entire statutory scheme. This "presents a question of statutory construction and of legislative intent. . . ." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

There are two indicia in this case by which this Court is obliged to hold that Chapter 64C was intended to constitute one entire, indivisible statute, and not a series of independent parts. First, the legislature provided that no criminal prosecution could be commenced under this statute without first giving the required warning. ALA. CODE tit. 14,

§ 374(16m)(a) (Supp. 1971). Apparently the legislature viewed the warning and the prosecution as inseparable acts and expressly forbade prosecution in the absence of the required warning.

Second, the statute contains no separability clause.

> In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety – that is to say, the rule is against mutilation of a statute; and if any provisions be unconstitutional, the presumption is that the remaining provisions fall with it.

Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936). Under Alabama law, the absence of a separability clause means that the statute is to be considered as an indivisible whole. *San Ann Tobacco Co. v. Hamm*, 283 Ala. 397, 406, 217 So.2d 803 (1969).

This Court can only conclude that the Alabama legislature intended Chapter 64C to stand or fall as a whole, both notice provision and criminal provision. Accordingly, the entire statute must fall upon the declaration of unconstitutionality of the notice provision.

This Court, therefore, holds that ALA. CODE tit. 14, §§ 374(16j)-(16o) (Supp. 1971), is in its entirety unconstitutional and void. An injunction will issue against its enforcement.

Done, this the 5th day of January, 1974.

/s/ Johnson
UNITED STATES DISTRICT JUDGE

/s/ Varner
UNITED STATES DISTRICT JUDGE

RIVES, Circuit Judge:

I concur in the foregoing opinion of my colleagues and adhere to similar views expressed in my dissenting opinion in *Grove Press, Inc. v. Bailey*, N.D. Ala. 1970, 318 F. Supp. 244 at 257-262, *vacated and remanded*, June 26, 1973, _____ U.S. _____ 41 L.W. 3670.

/s/ Rives,
UNITED STATES CIRCUIT JUDGE

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§ 374 (16j). **Definitions.** – As used in this chapter.

(a) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(b) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(c) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(d) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Obscene" means that description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) Predominantly appeals to the prurient, shameful or morbid interest, and (ii) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (iii) is utterly without redeeming social value or importance.

(g) "Hard-core pornography" means material, when considered as a whole, its predominant appeal is to prurient interest, is patently offensive to prevailing or contemporary standards, is utterly without redeeming social value or importance and in addition it goes substantially beyond customary limits of candor in describing or representing such matters.

(h) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) The character and content of any material described herein which is reasonably susceptible of examination by the defendant.

(ii) Such term includes the calculated purveyance of filth.

(i) Mailable matter means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States. (1969, p. 1253, § 1, appvd. Sept. 10, 1969.)

Applied in Grove Press, Inc. v. Bailey, 318 F. Supp. 244 (N.D. Ala. 1970).

§ 374 (16k). **Sale, etc., of certain materials unlawful.** – It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a person eighteen years of age or older:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of section 374 (16k) hereof, or explicit and detailed verbal descriptions or narative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is obscene or represents hard-core pornography.

(c) Nothing in this section shall be deemed to apply to mailable matter unless such mailable matter is known by such person to have been judicially found to be obscene or to represent hard-core pornography under this chapter or under the provisions of any other Alabama statutes (1969, p. 1254, § 2, appvd. Sept. 10, 1969.)

§ 374 (16l) Exhibition, etc., of certain shows or presentations unlawful. – It shall be unlawful for any person knowingly to exhibit for a monetary consideration to another or knowingly to sell to another an admission ticket or pass or knowingly to admit another for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse which is obscene or represents hard-core pornography. (1969, p. 1254, § 3, appvd. Sept. 10, 1969).

§ 374 (16m). Notice required before commencement of prosecution; action for declaratory judgment. – (a) No prosecution may be commenced against any person for violating sections 374 (16k) and 374 (16l) of this title unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this chapter, and the accused has, after receiving such notice violated this chapter.

(b) The written notice provided for in paragraph (a) of this section 374(16m) may be given by only the following officials: the state attorney general and any assistant attorney general; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to

prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the department of public safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this section 374(16m) shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this chapter. (1969, p. 1254, § 4, appvd. Sept. 10, 1969.)

§ 374 (16n). **Penalties.** – Any person, firm or corporation violating any provision of this chapter shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars ($2,000.00) for each offense, or be both so imprisoned and fined, in the discretion of the court. (1969, p. 1255, § 5, appvd. Sept. 10, 1969.)

§ 374 (16o). **Chapter cumulative.** – The Provisions of this chapter are cumulative and shall be in addition to any and all laws now enacted dealing with obscene or hard-core pornography and shall not be construed to limit or repeal other laws on such matters and shall specifically apply to the exposing of obscene and harmful materials to persons eighteen years of age and older. (1969, p. 1255, § 6, appvd. Sept. 10, 1969.)

ON WRIT OF CERTIORARI TO THE FIRST JUDICIAL DISTRICT COURT, PARISH OF CADDO, HONORABLE JAMES E. CLARK, JUDGE

(Filed December 3, 1973)

BARHAM, Justice.

The plaintiffs, Gulf States Theatres of Louisiana, Inc., the owner of the Don Theatre in Shreveport, Louisiana, and a number of other motion pictures theatres, United Artists Corporation, the owner of the movie film "Last Tango in Paris", and Joe Gianforte, Manager of Gulf States Theatres' Don Theatre, brought suit against the District Attorney for the Parish of Caddo and the Commissioner of Public Safety of the City of Shreveport, seeking to enjoin the defendants from enforcing R.S. 14:106 A (2) and (3). The plaintiffs commenced the showing of the nationally publicized and distributed motion picture, "Last Tango in Paris" in Shreveport on September 28, 1973. The first showing of said movie on that date was to a full capacity crowd. During the second showing of the motion picture on the same date, plaintiff Gianforte, was arrested and charged with violation of R.S. 14:106 A (2). At the same time, pursuant to a search warrant issued by a judge of the First Judicial District Court for the Parish of Caddo, police authorities seized four twenty-six inch reels of film entitled "Last Tango in Paris".

The following day, after the first showing on that day of "Last Tango in Paris" from other reels of film the plaintiff Gianforte, was again arrested and the reels of film which had produced on screen the movie "Last Tango in Paris" were seized. The copy of the film seized on September 29 was an exact copy of the film used on September 28. On that date, September 29, the plaintiffs sought relief from the United States District Court, Western District of Louisiana, Shreveport Division, and were granted a temporary restraining order prohibiting further arrest of Gianforte and further seizure of any film.

When the temporary order issued by the federal district court expired, the plaintiffs filed this suit in the First Judicial District Court, Caddo Parish, seeking a temporary restraining order and a preliminary and permanent injunction, enjoining and restraining and prohibiting the District Attorney and the Commissioner of Public Safety or their representatives from interfering with the showing of "Last Tango in Paris" at the Don Theatre in Shreveport until there could be a final judicial determination of the obscenity issue in an adversary hearing. The district court on the same date, October 4, denied plaintiffs' petition for a temporary restraining order and injunctive relief. Two criminal charges were then and are now pending in Caddo Parish against one the plaintiffs, Gianforte.

The plaintiffs then applied to this Court on that same date for relief under our supervisory jurisdiction. We granted writs of prohibition and mandamus to the district judge, ordering him to restrain and enjoin the defendants and their agents from making seizures of prints of the film "Last Tango in Paris", and from otherwise interfering with its showing at the Don Theatre in Shreveport, pending a judicial determination of the issues. Our docket No. 54,009, October 4, 1973, _____ So. 2d _____. Upon the district court's receipt of that order from our Court on October 4, the restraining order was issued and a rule to show cause on the 9th day of October why a preliminary injunction should not be entered was served upon the defendants.

On October 5, the defendants answered and reconvened, praying for a permanent injunction against the plaintiffs from further showing and exhibiting the film "Last Tango in Paris", "in accordance with provisions of R.S. 13:4711, et seq." (nuisance statutes). The trial court issued a rule to show cause on the same date fixed for the other rule why this permanent injunction should not issue against the plaintiffs, defendants in reconvention, which would permanently enjoin them from further showing and exhibiting

"Last Tango in Paris". The reconventional demand is accompanied by a certificate, signed by the District Attorney and the Commissioner of Public Safety, alleging on facts and allegations true and correct to the best of their knowledge, information and belief, that the affiants viewed the motion picture complained of, believed it to be obscene, and that the showing of said movie constituted the continuous conducting of a public nuisance under the laws of Louisiana.

On October 9 trial was begun on the main and reconventional demands. At the conclusion of the trial on October 12, 1973, the demands of plaintiffs in rule for injunctive relief against the defendants were rejected. The court entered a judgment in favor of the plaintiffs in reconvention, the District Attorney, and the Commissioner of Public Safety, against the plaintiffs, defendants in reconvention, permanently enjoining the latter from showing "Last Tango in Paris", beginning at 9:30 P.M. that day, October 12, 1973.

On October 16, the plaintiffs, defendants in reconvention, again applied to this Court under its supervisory jurisdiction and this Court granted a writ of certiorari, ordering the record of the proceedings below forwarded to this Court, and assigning the matter for hearing on October 26, our docket No. 54,044 (October 18, 1973), _____ So.2d _____. The order, which is on the usual certiorari form of this Court, further ordered all proceedings in the First Judicial District Court to be stayed and suspended.

On October 18, the plaintiff Gianforte, applied to this Court for review of certain preliminary rulings in the two criminal proceedings pending against him in the criminal section of the First Judicial District Court. This Court responded by order staying all proceedings in the criminal actions pending a final action by this Court in the civil proceeding which is now before us, our docket No. 54,049 (October 18, 1973), _____ So. 2d _____ .

Posed for our consideration are two issues of constitutionality – that of R.S. 13:4711-4717 and that of R.S. 14:106. We will first address ourselves to the constitutionality of R.S. 13:4711-4717, since that issue will be decided by this Court in the case on this same docket, State of Louisiana and the Parish of Caddo v. Gulf States Theatres of Louisiana, et al., No. 52,132, on remand from the United States Supreme Court. The case on remand is not only to be considered in light of Miller v. California, _____ U.S. _____, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and its companion cases, but also in light of Heller v. New York, _____ U.S. _____ 93 S.Ct. 2789, _____ L.Ed.2d _____ (1973); Roaden v. Kentucky, _____ U.S. _____, 93 S.Ct. 2796 _____ L.Ed. 2d _____ (1973), and Alexander v. Virginia, _____ U.S. _____, 93 S. Ct. 2803, _____ L.Ed.2d _____ (1973).

The plaintiffs' position is that after the beginning of a financially successful showing of the motion picture "Last Tango in Paris", they were, and have remained (except for our stay order), permanently enjoined from showing any version of that motion picture. Plaintiffs allege that this motion picture has been playing in approximately 350 cities throughout the United States and has been viewed by approximately 5,000,000 people. Plaintiffs further allege that they were receiving revenue in excess of $1,000 per day from the showing of the film and therefore they have been, and will be, under a permanent injunction, deprived of revenue in excess of $1,000 per day.

We are here concerned with the State's right to regulate obscene expression. Every exercise of the State's right to control obscenity "* * * implicates questions whether the procedures * * * were adequate to avoid suppression of constitutionally protected publications. '* * * [T]he line between expression unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn * * *. The separation of legitimate from

illegitimate speech calls for * * * sensitive tools * * *'. Speiser v. Randall, 357 US 513, 525 2 L ed 2d 1460, 1472, 78 S Ct 1332. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961).

Keeping constantly in mind, then, that under consideration here is the delicate line of demarcation between unconditionally guaranteed freedom of speech and the very limited exceptions under which speech and the expression may be legitimately regulated or suppressed, we examine the attacks upon the constitutionality of R.S. 13:4711-4717.

A history of the development of the statutes casts light upon the consideration of the constitutional attacks. The statutes originated with Act 47 of 1918, which was an act to declare houses of prostitution and their contents nuisances and to provide means to enjoin and abate them. All seven provisions, R.S. 13:4711-4717, remained unchanged for over 40 years. In 1960 the Legislature attempted by Act 201 to amend Section 4711 to include *obscenity* with *prostitution* in the definition of a nuisance.

Chapter 32 of Title 13 of the Revised Statutes of 1950 is titled "Particular Classes of Actions and Cases". Part I is titled "Abatement of Public Nuisances". Subpart A, titled "Houses of Prostitution", contains these statutes which remained as originally enacted when the Revised Statutes of 1950 were adopted. They provide, as the title indicates, only a civil action for the abatement of the *nuisances of houses of prostitution.* Subpart B of Chapter 32, Part I, is a group of statutes designed to control and to abate the public nuisance of *gambling houses.* The control of prostitution, as indicated, originated in 1918. Two years later the control of gambling through abatement as a public nuisance was legislated. Disorderly houses (when properly defined), houses of

prostitution, and gambling houses have always been subject to control, regulation, and suppression under the police power of the state. Moreover, the control of nuisances in general is usually governed in some part by *police regulations.* Analogous to the common law nuisance is our Civil Code Article 669, which states that insufferable inconveniences are regulated and governed by the custom of the place and the "*rules of the police*". At common law, nuisances per se include those activities which are forbidden by criminal law and sanctions.

Through development of a special civil action for the abatement of the nuisance of *prostitution,* our Legislature provided that houses of prostitution could be abated upon the petition of the district attorney or upon the petition and proper affidavit of interested parties. But the control of the act of prostitution is in no wise analogous to the control of obscenity. Although it may be possible to incorporate in some manner under the title "Abatement of Public Nuisances" the control of places where obscene expression is exhibited, published, or otherwise communicated, there is no corollary between control of the nuisance of prostitution and control of expressions which are subject to regulation only when they cross over that fine line into obscenity. A reading of R.S. 13:4711-4717 in light of their development and in light of their original purpose of controlling only the nuisance of *prostitution* makes apparent the reasons for the numerous attacks upon these statutes when they are used to control *obscenity.* The provisions must then be examined with careful consideration of the guarantees of freedom of expression afforded by the United States Constitution, Fourteenth and First Amendments, and Louisiana Constitution Article I, Section 3.

R.S. 13:471 "declares any place a nuisance where there exists prostitution or obscenity as defined by the criminal laws of the State. R.S. 13: 4712 provides the procedure for an ex parte temporary injunction and for

permanent injunction after hearing on a rule nisi to abate the nuisance perpetually. R.S. 13:4713 provides for contempt penalties for violation of any of these provisions relating to the injunction and for lien upon, and seizure and sale of, the property where the nuisance was conducted for the fines imposed upon a finding of contempt. R.S. 13: 4714 closes the place where the nuisance existed so that it cannot be used for any purpose for a period of up to one year. R.S. 13:4715 and 4716 provide for bond for release of property and disposition of fines and collection of fees. R.S. 13:4717 provides that judgment as to what constitutes a nuisance "*may be based on the general reputation so proven*".

The statutes are attacked as being unconstitutional on their face for several reasons. The clear language of R.S. 13:4712 mandates that a temporary injunction "shall" be granted by the judge upon the simple allegation by the district attorney *upon information and belief* of the existence of obscenity without any requirement of a showing upon probable cause that obscenity is being published in some manner. When the district attorney presents the petition and his verified affidavit, the judge is required without the exercise of discretion to issue a temporary injunction. If one other than the district attorney or other parish official named in the statute brings the action, it is required only that a certificate be obtained from the judge that the applicant is acting in good faith and not for improper purposes. In either instance no adjudicative function at all is required. The statute calls only for a simple ministerial act by the judge. "Shall" is a command leaving no room for discretion. Naquin v. Iberia Parish School Board, 157 So. 2d 287 (La. App. 3rd Cir. 1963). As the appellate court succinctly stated: "* * * Rather than a judicial mind passing on the relative merits of the petition, the judicial hand is forced by the Legislature to sign a temporary restraining order." State v. Gulf States Theatres of Louisiana, Inc., 255 So. 2d 857, 860 (La. App. 2nd Cir. 1971).

However, even if the literal wording of the statute, "shall", was construed as not requiring a simple ministerial act by the judge, this Court is still forced to find that there are no standards prescribing the *consideration for a judicial determination* of whether to issue or to refuse to issue the temporary restraining order. Is judicial determination for issuing the ex parte order made "from specific facts shown by verified petition or by supporting affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had"? C.C.P. Art. 3603. This is the ordinary basis for the issuance of a temporary restraining order. Certainly these Code of Civil Procedure requirements are not sufficient to satisfy the First Amendment requirements. If the court were considering whether a Fourth Amendment warrant for search and seizure was properly issued, it would examine the affidavit for facts to establish probable cause to review the basis for that judicial determination. However, there is no method whereby a requirement of probable cause for a criminal search warrant can be read into a civil statute for abatement of nuisance. So, if it is assumed arguendo that the judge is not mandated to act, but can make a judicial determination to issue or not to issue the ex parte injunction, the statute is nevertheless unconstitutional because no standards are set which govern the judicial determination for the issuance of the ex parte injunction.

Although the State may regulate the dissemination of obscene expression, since obscenity is an exception to the constitutionally protected right of free speech, the State is required to observe stringent safeguards in the exercise of the right to prohibit. The very minimum constitutional standard required before there can be a suppression of an expression alleged to be obscene is an independent judicial finding of probable cause that the expression is obscene and therefore not constitutionally protected speech. Marcus v. Search Warrant, supra; A Quantity of Books v. Kansas, 318 U.S. 205,

84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

In State v. Eros Cinema, Inc., 262 La. 706, 264 So.2d 615 (1972), we specifically and unanimously determined that there could be no seizure of an allegedly obscene expression without a prior judicial determination of an adequate factual basis for a probability that the expression constitutes obscenity. In that case, as in a number of cases decided by the United States Supreme Court which are cited there, we were considering a seizure under a search warrant for the purpose of criminal prosecution.

In Marcus v. Search Warrant, supra, the court, pretermitting the question of lack of hearing before seizure, held the seizure under the warrant unconstitutional, for the warrant gave total discretion to the executing officers to make an on-the-scene determination of what constituted obscene publications. In Marcus, the court also condemned the issuing of warrants and the seizure of the allegedly obscene materials "* * * on the strength of the conclusory assertion of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene". That court concluded: "Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."

Under our statute, the simple verified affidavit of the district attorney on information and belief gives rise to an immediate order of suppression by injunction of alleged obscenity. This suppression is equally as effective as, and perhaps more onerous than, a seizure under search warrant. Moreover, the order for injunction acts as a mass suppression such as was condemned in Marcus. The order does not suppress only one copy of film; it suppresses all copies of the film. The statute on its face permits this suppression without any prior judicial determination, even ex parte, that the material to be suppressed is probably obscene in fact. The lack of standards for a judicial determination of probable

cause is contrary to the numerous United States Supreme Court pronouncements that this is a minimal requirement for constitutionality of statutes providing for suppression of alleged obscenity before an adversary hearing. There is no provision in our statute requiring an independent judicial determination of the probability of obscenity before an ex parte order of suppression issues. While a statute not unconstitutional on its face may be unconstitutionally enforced, *a statute which is unconstitutional on its face cannot be constitutionally enforced.*

We are constrained to find that R.S. 13: 4712 is unconstitutional on its face because it authorizes the total ex parte suppression of alleged obscenity without any independent judicial determination on facts that the expression is probably obscene.

We examine R.S. 13:4711-4717 for constitutionality to determine if these statutes provide for prior restraint without notice or trial. Alternatively, assuming that prior restraint can be had ex parte, we examine these statutes to determine if adequate safeguards for speedy judicial adversary hearing are provided.

We now address ourselves to a consideration of prior restraint in the context in which it is used in much of the current jurisprudence. The question is bifurcated: (1) Can there be prior restraint of future publication, circulation, or exhibition of an obscene expression in a *civil* proceeding without notice and hearing after the initial publication of that expression? (2) If so, what are the limitations and safeguards required for constitutionality of such restraint?

Times Film Corporation v. Chicago, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961) is often cited for the broad principle that prior restraint without notice and hearing may be had. The limited holding of Times Film Corporation is: "Petitioner's narrow attack upon the ordinance does not

require that any consideration be given to the validity of the standards set out therein. They are not challenged and are not before us." The Court posed the one question it answered: "* * * whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide." The court, with four justices dissenting, held the ordinance not void on its face under such an attack.

In Bantam Books v. Sullivan, supra, the court said: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. * * * We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint. * * *".

Then, in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the limited question before the court in Times Film is reexpressed from Bantam Books to be "* * * 'whether a prior restraint was necessarily unconstitutional *under all circumstances*' ". (Emphasis from Bantam Books.) The argument in Freedman was that if it was accepted as law that the first showing of a film may be restrained under proper guidelines and judicial protection, the provision for censorship in a Maryland statute was an "invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression". It was there said: "Applying the settled rule of our cases, we hold that a *noncriminal* process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. * * * Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. * * * the procedure

must also assure a prompt final judicial decision, to minimize a deterrent effect of an interim and possibly erroneous denial of a license."

However, in A Quantity of Books v. Kansas, supra, a Kansas statute authorized the seizure of allegedly obscene books before an adversary determination of their obscenity and their destruction by burning or other means after that determination. Mr. Justice Brennan, author of that opinion, who also wrote the majority opinions in Marcus v. Search Warrant, Bantam Books v. Sullivan, and Freedman v. Maryland, cited those three cases, as well as Kingsley Books, and finally determined that the failure to afford an adversary hearing made the procedure leading to the order of seizure of all copies of seven specified novels unconstitutional.

Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957) is a much misunderstood opinion. First, that case does not involve prior restraint without an adversary hearing although the language of the United States Supreme Court may lead one to believe such to be the case. There, a petition was filed by the chief legal officer of the City of New York to enjoin several defendants from distributing a series of allegedly obscene booklets. No restraint was sought in that case except after an adversary hearing in response to the rule nisi, issued with the notice of the suit for injunctive relief, to show cause within four days why the defendants should not be enjoined pendente lite from distributing the books. The state court concisely held that "* * * when the court – *after an* adversary hearing – is able to read and examine the publications objected to, and acts judicially to enjoin their distribution, it is apparent that there is no 'previous restraint' in the genuine historical and constitutional sense of that term." Burke v. Kingsley Books, 142 N.Y.S.2d 735, 208 Misc. 150 (1955). The United States Supreme Court in Kingsley recognized that the adversary hearing under the rule to show cause was dispensed with because the "appellants consented to the granting of an

injunction pendente lite and did not bring the matter to issue promptly, as was their right under subdivision 2 of the challenged section, which provides that the person sought to be enjoined 'shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial' ". The protection of the preliminary adversary hearing before even a temporary restraining order could issue, a requirement of joinder of issue for final determination within one day after issue was joined, and the requirement that judgment be rendered within two days were actually the basis for the holding in Kingsley that reasonable safeguards were afforded for protection of First Amendment rights in that statutory scheme for control of obscenity.

In State v. Eros Cinema, supra, this Court found that there was no way to preserve the best evidence in a criminal prosecution for exhibiting an obscene film except upon seizure of the film under search warrant. For this reason, we held that such a seizure is permissible in the *limited quantity necessary* where there are proper safeguards for establishing probable cause and for providing quick judicial determination on the merits, review, and final judgment. Our reason for believing this brief ex parte seizure, or, if you will, temporary suppression, was necessary in that criminal prosecution does not exist in this civil suit to abate a nuisance. We found there that in a criminal prosecution the Fifth Amendment right against self-incrimination would not permit a subpoena duces tecum. However, in a civil proceeding under the nuisance statute a subpoena duces tecum may be used to obtain materials desired as evidence in the proceeding. The compelling reasons for permitting a seizure for evidence under a constitutional warrant as provided in the Fourth Amendment, do not exist in a proceeding wherein suppression of the showing of the particular film alleged to be obscene and the closing of the theatre in which it is shown are sought.

A thorough consideration of these cases leads us to conclude that *in a civil proceeding to abate an obscene expression as a nuisance there can be no prior restraint without an adversary judicial adjudication.*

Where prior restraint is permitted by statutes in such a case as this, the statutes are unconstitutional because the safeguards which must follow as set forth in numerous United States Supreme Court opinions are not provided in the statutes. In Marcus, Bantam Books, Freedman, A Quantity of Books, and Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), the overriding holding is that there can not be, under a licensing statute, a statute for injunction or destruction, or a criminal prosecution, prior restraint without notice and hearing by seizure under search warrant or suppression by other method, *unless* immediate judicial determination in an adversary hearing is available, and a speedy final judicial determination of the issue is provided.

Under the statutes at hand, the first hearing on the question of the actual obscenity of the suppressed expression is by rule to show cause five days after the initial suppression. Since the form of suppression is injunction, under our law there can be no suspensive appeal from the trial court's ruling. C.C.P.Art. 3612. An appeal from a final injunction is subject to the same delays as other appeals. Because of these delays, in a case such as this, great injustice may result if the expression originally suppressed by temporary restraining order is finally found to be a constitutionally protected expression. In the instant case, we permitted plaintiffs to by-pass the Court of Appeal on application for exercise of the Court's supervisory jurisdiction in order to minimize the delay.

We said in Eros Cinema, supra, that we would require a hearing into the obscenity issue under seizure by search warrant within two days and a judgment at the trial court level 24 hours thereafter, and that this Court would treat

application for writs from an adverse ruling as remedial, thus assuring a speedy final determination of the issue. Here in this civil proceeding none of these protections are afforded, although the consequences which flow from the suppression may actually be graver and more onerous than those under our criminal statute. Even if prior restraint were permissible, the statute would be unconstitutional because it does not afford the safeguards for protection of First Amendment rights.

We have reserved for last consideration in this discussion of prior restraint the most serious constitutional defect in the statutes. This consideration arises under the original and historical application of the doctrine of prior restraint.

Actually, prior restraint, in the context of its historical origin and as discussed in most early jurisprudence, is defined as that restraint or suppression of an expression without judicial determination of the right to suppress *before any publication, any exhibition, any communication of that expression.* The prohibition against prior restraint predates even our Bill of Rights. In 70 Columbia L. Rev. 1403, 1409, Blackstone's theory of the prohibition against previous restraint involving freedom of the press is discussed. Blackstone took the view that there could be no previous restraints upon publications, saying: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." The conclusion of the writer of that article is that Blackstone's distinction between prior restraints against publication and punishment subsequent to publication has survived and is applicable to the present legal doctrine. The question under this historical and very limited expression of the doctrine prohibiting prior restraint is whether an evidentiary hearing and judicial determination are required before an expression

which is obscene can be *suppressed, prohibited, or restrained even before it is published, exhibited, or in any manner communicated. We are compelled to answer that, under this limited definition of prior restraint, suppression cannot be had without notice and a hearing.*

In Near v. Minnesota, 383 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), the court, in language broader than required by the issue presented to it, gave three examples of exceptions to the application of the doctrine, including attempts to control obscene publications. In Burstyn v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), the court appeared to remove the obscenity exception, and, finally, in Kingsley Books v. Brown, supra, the court correctly observed that the Near case had not concerned obscenity, and the exception of obscenity was discarded.

The doctrine of prohibiting prior restraint of expression without notice and hearing before the expression is ever published has more validity today than even in much earlier times when it was designed to prohibit the government from destroying printing presses so there could be no future publication. If these statutes do in fact prohibit expression without notice and hearing even before the expression is communicated, published, or exhibited, they violate the constitutional right of free expression under the First Amendment and our Constitution, Article I, Section 3.

State ex rel. Liversey v. Judge Civil District Court, 34 La.Ann. 741 (1882), was a suit where plaintiff, under an allegation of previously published false, malicious, and libelous material, sought an injunction prohibiting the defendants from publishing in any future issue of the newspaper, which he alleged had libeled him, any defamatory material. The Court held that, because of the constitutional right to free speech, libel and slander were "* * * subjects of punitory, and not of merely preventive, remedies. The Constitution rules over all". The injunction was held to be an absolute nullity. The Court

discussed the historical evolution of liberty of the press, and stated that to allow an injunction aimed at prohibiting further publication of defamatory material would permit the establishment of a complete censorship over the press so enjoined. Since our Court stated so clearly in that case that it cannot enjoin any future publication of defamatory remarks, certainly it must hold it cannot enjoin future publication of any and all expression. Defamatory and obscene speech are both limited exceptions to the First Amendment privilege.

We move to a consideration of the other provisions of these statutes. R.S. 13:4712, providing for the mandatory restraining order, the delayed evidentiary hearing, and the final permanent injunction, is buttressed by *R.S.13:4714*, which states in pertinent part that if the existence of a nuisance is established under this set of statutes, "an order of abatement shall be entered as a part of the judgment in the case, which order *shall direct the effectual closing of the building, structure, land or other place against its use for any purpose for the period of one year* * * *".

R.S. 13:4713 provides for contempt proceedings which may be brought ad infinitum, carrying fines up to $250.00 and imprisonment up to six months. The fines levied for contempt become liens upon the place which has been closed for all purposes.[1] Therefore, the combination of R.S. 13:4712, 4713 and 4714 places "prior restraint" as defined in its most limited sense and in its historical setting – i.e.,

[1] Under this statute not only is the offensive, obscene material enjoined from exhibition, but none of the movable property or personal effects including equipment used to manufacture, exhibit, or distribute expression may be removed from the premises. And when the premises are closed, these effects along with the immovable closed become subject to the lien for contempt fines and subject to eventual seizure and sale to satisfy contempt judgments. This accomplishes a denial of the application of the doctrine of prohibiting previous restraint upon publication.

restraint of expression before it is communicated the first time – upon any future publication, exhibition, or expression, whether obscene or not.

Gambling devices and the accoutrements of houses of prostitution, which may be and are controlled under the exercise of the police power, can be legally destroyed so as not to offend again. This, however, affords no basis for analogy with the suppression and regulation of speech and other means of expression.[2] In any regulation touching upon the areas of speech and other expression, there is a perfectly valid distinction between prior restraint and accountability after abuse. Louisiana Constitution, Article I, Section 3 reads: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; *any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.*" This is a clear and concise statement of our constitutional view that there can be no prior restraint of speech or other expression. One may speak, but when he exercises this privilege, he is accountable if there is an actual abuse of the privilege under one of the few exceptions to total freedom of expression.

R.S. 13.4714 does not permit mere book-burning or film destruction where there is an abuse of the First Amendment privilege. This provision has the effect of

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[2] This particular constitutional defect, as well as others in the statutes we consider, probably results from the fact that the two situations were analogized. R.S. 13:4711-4717 originally abated the particular public nuisance of houses of prostitution. The amendment of R.S. 13:4711 in 1960 to include obscenity, an exception to the First Amendment right, simply treated obscenity as a nuisance. Defendants – plaintiffs in reconvention – use a 1918 procedure providing only the minimal safeguards for abatement of houses of prostitution to close a First Amendment protected tool of communication, a motion picture theatre.

sledgehammering the printing press, the camera, the projectors, all the tools of expression in every medium so that there can be no future expression at all for one who transgresses by crossing the line from free speech to obscenity upon one occasion. We can envision no more fatal defect of prior restraint under its original definition in a statute which attempts to control obscenity than that which is found in R.S. 13:4717. That provision mandates the court to effectively close the avenue of any expression whether or not it abuses the privilege and before it is so determined.

In Kingsley Books v. Brown, supra, a New York statute was upheld by the United States Supreme Court because "* * * as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive." To the contrary, under our statute there can be no expression of any kind – good or bad – emanating either from the premises or from the devices on the premises for a period of one year. This is the very essence of the prior restraint condemned by Blackstone, by our Bill of Rights, and by our jurisprudence. Of all the constitutional violations on the face of these statutes, the prior restraint imposed under R.S. 13:4717 is the most offensive.

This particular section of the Revised Statutes does restrict expression not yet found to be an offense and not yet uttered. It is a classic example of prior restraint of speech and expression and is violative of federal and state constitutions.

Moreover, these statutes effect deprivation of property without due process in violation of our Constitution, Article 1, Section 2 and the Fourteenth Amendment to the United States Constitution. R.S. 13:4712 and 4714 in combination may close the premises where obscenity has been exhibited and deprive the owner of its use even if the use of his premises for exhibition of obscenity was not known and could not have been known by him R.S. 13:4715 does not

give him adequate relief from this deprivation of property. It merely provides that upon posting bond with surety *"in the full value of the property"* and upon certain guarantees he may release the property. The exchange of the full value for the thing is as much a deprivation of property without due process as if the premises were retained. Again, if another obscenity is exhibited, even entirely without the owner's knowledge, he must forfeit part of his bond each day of the exhibition. So, R.S. 13:4717, which is an exercise of unconstitutional prior restraint, also falls as a deprivation of property without due process of law.

It may be argued that since the statutory provision that the premises may be closed for use for any purpose for one year was not applied to the plaintiffs in the judgment of injunction, they cannot complain of the constitutionality of such a provision. The plaintiffs have standing to complain of R.S. 13:4714 for several reasons. First, Section 4714 provides that a judgment declaring an expression obscene and the premises a nuisance "may be based on the general reputation" of the premises or of the defendants or of the occupants or of habitual visitors thereto. Therefore, under the express provisions of Section 4717, it cannot be said that these defendants are not aggrieved by any judgment which declares that the premises they occupy and the activities they engage in on those premises constitute a nuisance. According to R.S. 13:4717, the defendants may be adjudged guilty of operating a nuisance upon submission of the judgment in this case as proof of reputation. Certainly the judgment can, under Section 4717, constitute some evidence in the future. Therefore, the judgment has a chilling effect upon the defendants' right to make any expression, whether constitutionally protected or not, for fear of contempt penalties and further declaration of the premises as a nuisance.

Plaintiffs are entitled to attack the constitutionality of R.S. 14:4717. That provision is in absolute contravention

of the principle of prior restraint upon expression and is also a deprivation of property without due process of law. It reads: "On the hearing in any action filed under the provisions of R.S. 13:4711 through 13:4717 evidence of the general reputation of the building, structure, land or other place or of the defendant or of the occupants thereof or habitual visitors thereto shall be admissible, *and judgment may be based on the general reputation so proven.*" Presumptions are provided for at law, and presumptions lie with one party or the other in certain civil proceedings. Burdens of proof shift according to the nature of the proceedings and the nature of the proof required in the proceeding. However, we can find no expression of law permitting a judgment to be based solely on the general reputation of the parties to the suit or of the things involved. Certainly no judgment affecting the right of free speech could be based on general reputation. Proof that a person is repeatedly obscene in expression, that a press repeatedly has printed obscenities, or that a building has repeatedly housed obscenity is not proof susceptible of sustaining a judgment that another expression from one of these is itself an obscenity. One may be punished for uttering obscenities, one may be held in contempt for refusing to refrain from circulating that which is obscene, but one cannot be adjudged guilty of a new obscenity on reputation alone. R.S. 13:4717, which is part of the whole general statutory scheme for the action against the defendants, is unconstitutional.

We are of the opinion that R.S. 13:4711 – 13:4717 are unconstitutional insofar as they attempt to regulate obscenity.

The plaintiffs, defendants in reconvention, also attack these statutes and the injunction issued against them on the ground that R.S. 14:106 A(2) is unconstitutional. The argument is that obscenity referred to in the nuisance statutes is, by those statutes, defined by the "Criminal Laws of this State", (R.S. 14:106) and, therefore, if R.S. 14:106 A (2) is

unconstitutional, the nuisance statutes are unconstitutional and the injunction issued against them is illegal, void and of no effect. We have considered the constitutionality of R.S.14:106 A (2) and (3) in State v. Shreveport News Agency, Inc., No. 53,985 on this docket, ___So.2d ___ (La. 1973), and State v. McNutt, No. 52,489, ___ So.2d ___ (La. 1973).

For the reasons assigned in State v. Shreveport News Agency, Inc. and State v. McNutt, plaintiffs' allegation of unconstitutionality here is supported and, pursuant to the clear pronouncement by the United States Supreme Court, we have declared R.S. 14:106 (2) and (3) to be unconstitutional. For that reason and other reasons herein presented, we hereby declare R.S. 13:4711-4717 unconstitutional, insofar as they attempt to declare obscenity a public nuisance. The permanent injunction against the plaintiffs, defendants in reconvention, entered by the trial court, is dissolved, vacated and set aside.

It is further ordered, adjudged and decreed that the defendants, John A. Richardson, District Attorney, and George W. D'Artois, the Commissioner of Public Safety for the City of Shreveport, their agents, employees and representatives, are permanently enjoined and prohibited from interfering with the showing of "Last Tango in Paris". Defendants are to pay all costs of the proceedings.

* * *

SUPREME COURT OF LOUISIANA
NO. 54,044

GULF STATES THEATRES OF
LOUISIANA, INC.,ET AL.

v.

JOHN A. RICHARDSON and
GEORGE W. D'ARTOIS

SANDERS, Chief Justice (dissenting).

Last year, in State v. Gulf States Theatres of Louisiana, Inc., 264 La.44, 270 So.2d 547 (1972), this Court interpreted LSA-R.S. 13:4712, the abatement of nuisance statute, and upheld its constitutionality. The case was thoroughly considered on two occasions, the opinions being authored by Chief Justice McCaleb and Mr. Justice Summers.

Answering the constitutional arguments presented, this Court stated:

> "The principal thrust of the attack upon the constitutionality of the act is aimed at the quoted provision declaring that 'the judge . . . shall grant a temporary injunction.' It is contended that there is no requirement that probable cause be shown through factual allegations in the affidavit accompanying the petition; that is, the mandate that the judge 'shall' grant the temporary injunction deprives the judge of any discretion in the matter; the implication being that the judge must issue the temporary injunction whether the nuisance exists or not. For this reason, it is asserted, the First Amendment right of freedom of expression enjoyed by makers and exhibitors of motion picture is restrained without reasonable cause.

"This argument lacks merit. The statute requires that the petition allege the existence of a 'nuisance' and that it be verified by the district attorney. This makes it necessary for the trial judge to determine, on the basis of the facts alleged, whether 'obscenity', as defined by Article 106 of the Criminal Code, is 'carried on' before he issues an injunction. If the allegations and the accompanying affidavit do not, in the judge's opinion, recite facts which warrant a conclusion that a 'nuisance' is being 'carried on' then the prerequisites to the issuance of the injunction have not been satisfied and the judge must not sign the temporary injunction. On the other hand, if the allegations of the petition and the accompanying affidavit do set forth, in the judge's opinion, that a 'nuisance' is being carried on, then, and in that event, he 'shall' issue the temporary injunction.

"Under this view a great deal of discretion is left to the trial judge for a judgment on his part must be made. He must ascertain from the petition and accompanying affidavit whether the facts set out fulfill those elements of the law which, taken together, constitute a nuisance. For instance, in this case, the petition must allege that the film must have been, and is being, exhibited with intent to primarily appeal to the prurient interest of the average person. And it must be lewd, lascivious, filthy and sexually indecent.

* * *

"The word 'shall' as used in this statute is nothing more than the mandate the law imposes upon the judge to issue an order, as in other cases, when the rights of the parties are supported by the law and properly alleged facts;

e.g., 'An injunction *shall* issue . . . .' LA.Code Civil P.art.3601; 'A temporary restraining order *shall* be granted without notice when it clearly appears from specific facts shown by a verified petition or by supporting affidavit . . . .'

"Any restriction imposed in advance of a final judicial determination on the merits of obscenity must be limited by the shortest fixed period compatible with sound judicial resolution and the proceedings must be assured of a prompt final judicial decision. A period of fourteen days would not be too long within which to commence such proceedings. United States v. Thirty-seven Photographs, 402 U.S.363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971)."

Today reinterpreting the same statute in a manner adverse to its constitutionality, the majority holds it unconstitutional. I disagree.

The central error, in my opinion, is that the reinterpretation itself shoves the statute off the constitutional cliff. The decision violates the cardinal principle, that, when it can reasonably do so, the Court should interpret a statute in a manner that will preserve its constitutionality. When a statute is susceptible of two interpretations, one rendering it unconstitutional and the other constitutional, the Court is under a duty to adopt the one sustaining constitutionality. Pearce, ex rel. Structural Pest Con. Com'n v. Sharbino, 254 La. 143, 223 So.2d 126(1969); State v. Smith, 252 La.636, 212 So.2d 410 (1968); State v. Gatlin, 241 La.321, 129 So.2d 4 (1961); 16 Am.Jur.2nd, Constitutional Law, § 144, p. 345.

In Pearce ex rel. Structural Pest Con. Com'n. v. Sharbino, supra, this Court stated:

"To determine whether the present statute is unconstitutional, we must examine its provisions in the light of well established constitutional principles. Among them are salutary rules of judicial restraint. When a court can reasonably do so, it will construe a statute so as to preserve its constitutionality. Buras v. Orleans Parish Democratic Executive Committee, 248 La.203, 177 So.2d 576; Bauman v. Ross, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270; United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989; 16 Am.Jur.2d, Constitutional Law, § 144, p. 345. Moreover, when a statute is susceptible of two interpretations, one making it unconstitutional and the other constitutional, the interpretation sustaining constitutionality should be adopted. Borden v. Louisiana State Board of Education. 168 La.1005, 123 So.655, 67 A.L.R. 1183."

The original interpretation of the statute by this Court, in my opinion, was sound. I would adhere to it and uphold the statute.

I also dissent from the holding that LSA-R.S. 14:106, the criminal obscenity statute, is unconstitutional for the reasons assigned by me in State of Louisiana v. Shreveport News Agency, Inc., No. 53,985, handed down today.

For the reasons assigned, I respectfully dissent.

SUPREME COURT OF LOUISIANA
NO. 54,044

GULF STATES THEATRES OF
LOUISIANA, INC., et al

v.

JOHN A. RICHARDSON and
GEORGE W. D'ARTOIS

MARCUS, Justice (dissenting)

I dissent. I do not agree with the majority that R.S. 13:4711-13:4717 are unconstitutional insofar as they attempt to regulate obscenity. My reason for this conclusion is ably set forth in the majority opinion in State of Louisiana v. Gulf States Theatres of Louisiana, Inc., 270 So.2d 547 (La. 1972), wherein the constitutionality of these statutes was upheld. I further find that R.S. 14:106A(2) is constitutional for the reasons assigned in my dissenting opinion in State of Louisiana v. Shreveport News Agency, Inc., No. 53,985 on the docket of this Court handed down this date.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

STATE OF MISSOURI, ex rel. DEE
WAMPLER, Greene County
Prosecuting Attorney, Respondent,
Respondent,

v.

DICK and EDNA BIRD, GARY NEIL ROOT,
NANCY JEAN SOUTER and READERS BOOK
SERVICE, INC.,
Appellants.

Appeal from the Circuit Court of Greene County
The Honorable Douglas W. Greene, Judge

No. 57240

Filed: October 8, 1973

PER CURIAM

Appeal (taken prior to January 1, 1972) in action by State of Missouri for civil injunction.

On July 19, 1971, the State of Missouri petitioned the Circuit Court of Greene County to enjoin and restrain defendants from sale and distribution of "obscene, lewd and indecent books, pamphlets, magazines and other articles and materials * * * in violation of Revised Missouri Statutes 1969, 563.280, 563.285."

Upon reading the petition, together with attached affidavits of three Springfield, Missouri, police officers, the court granted, *ex parte*, a temporary injunction and ordered defendants to appear and show cause why the injunction should not be made permanent.

The show-cause hearing took place July 26, 1971. Defendants presented no evidence. Defendant Readers Book Service, Inc., is a Missouri corporation engaged in operation of a newsstand or bookstore in Springfield; defendants Dick and Edna Bird are officers of the corporation, and defendants Nancy Jean Souter and Gary Neal Root are employees of the corporation.

The State produced as witnesses four officers of the Springfield Police Department; and presented six magazines purchased by the officers in the bookstore, and a box of magazines seized earlier in an unrelated action.

On July 27, 1971, the court issued a permanent injunction against defendants and ordered them to surrender all publications in their possession, whether at the store or in their homes, to the Chief of Police of Springfield. The order also gave the police power to search the store and homes of defendants and to seize any materials which appeared to come within the description contained in the order.

On the same day, after the search and seizure was accomplished, the court commenced an examination of the surrendered and seized materials, multiple copies of the initially seized publications, to determine whether they were obscene.

On July 29, 1971, the court concluded its determination and made exhaustive findings of fact in which it was determined that certain (most) of the publications by name, description and title "to the average person, applying contemporary community standards, would appeal and (do) appeal to a prurient interest in sex, that they are utterly without any redeeming social value and that (they are) * * * obscene." Pursuant to this determination the court entered a permanent injunction against sale of the designated obscene publications and ordered them destroyed. The destruction was stayed pending resolution of an appeal and the publications in question were filed as exhibits in this court.

Appellants contend the court erred: (1) in granting the injunction because it constitutes a prior restraint on freedom of speech and press and thus violates the First and Fourteenth Amendments to the United States Constitution; (2) in authorizing search of defendants' homes because private possession of even obscene matter is absolutely protected under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; (3) in authorizing a search warrant because the authorization was based upon an erroneous and incorrect standard and was not based upon a prior adversary hearing, in violation of the First, Fourth, and Fourteenth Amendments; in granting the injunction and

ordering destruction (4) because there was no evidence upon which to base a finding of obscenity, (5) because the materials are not obscene and (6) because Sections 563.280 and 563.285, RSMo 1969, are unconstitutional.

Respondent concedes (I) that the court erred in enjoining appellants from ever manufacturing, selling, or distributing obscene materials because such order constitutes a prior restraint.

Respondent counters appellants' remaining points, asserting: (II) the search of defendants' homes did not violate their right to possess obscene material for private use, because they were using their homes to store large quantities of material for supply of the store; (III) the search warrant contained a proper standard, and the "adversary" hearing satisfied constitutional requirements; (IV) the state is not required to present evidence of obscenity independent of the alleged obscene material; (V) the court based its finding of obscenity upon a correct constitutional test; (VI) Sections 563.280 and 563.285,[1] supra, are constitutional.

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[1] Section 563.280, RSMo 1969, provides: "Every person who knowingly shall manufacture, print, publish, buy, sell, offer for sale or advertise for sale, or have in his possession, with intent to sell or circulate, or who knowingly shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, or shall write, print or publish, sell or circulate, any letter, handbill, card, shall circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, when, where, how, of whom or by what means any of the things herein mentioned can be had or obtained, and whoever shall print or publish in any newspaper and vulgar, scandalous, obscene or immoral pleadings or evidence in any case or proceeding before any court or tribunal whatever, shall, on conviction

As in *City of Kansas City v. O'Connor*, No. 57266, ___S.W. 2d ___(Mo. 1973), *City of Kansas City v. McNellis*, No. 58132, ___S.W. 2d ___ (Mo. 1973), and *City of Kansas City v. Reed*, No. 58133, ___ S.W. 2d ___ (Mo. 1973), also decided this date, appellants' position is that the posture and fundamental question of their appeal are the same, and that they should receive the same treatment given defendant by the United States Supreme Court in *State v. Hartstein*, 469 S.W. 2d 329 (Mo. banc 1971), i.e., conviction reversed, citing *Redrup v. New York*, 386 U.S. 767 (1967). *Hartstein v. Missouri*, 404 U.S. 988 (1971).

As in the City of Kansas City cases, supra, whatever merit this appeal may have possessed at the time of submission to this court May 18, 1973, has now been removed in a series of subsequent decisions[2] by the United States Supreme Court.

Under these authorities and on this record, appellants' specific contentions, with the exception conceded by respondent, must be denied.

(Footnote 1 Continued)
thereof, be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned not more than one year in the county jail, or both; but nothing in this section shall be construed so as to affect teaching in regular medical colleges, or public standard medical books, or reports of medical societies, or the practice of regular practitioners of medicine, or druggists in their legitimate business." Section 563.285, RSMo 1969, provides further that the publication, sale or distribution of the matter proscribed by Section 563.280 may be enjoined.

[2] These decisions are summarized in City of Kansas City v. O'Connor, No. 57266,___ S.W. 2d ___ (Mo. 1973), City of Kansas City v. McNellis, No. 58132,___ S.W. 2d ___ (Mo. 1973), City of Kansas City v. Reed, No. 58133,___ S.W. 2d ___ (Mo. 1973), supra, decided this date. The summary is not repeated here.

With respect to Point I, the court, as conceded by respondent, did err in enjoining defendants from ever selling and possessing obscene matter for sale because the order, to that extent, does constitute prior restraint. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

With respect to Point II, the court did not err in authorizing a search of the Bird home becaue it is a fair inference from the evidence that they were using their home to store large quantities of obscene material for supply to their store. This is not the limited zone of privacy of one's own home in which to read or view what he pleases protected by *Stanley v. George*, 394 U.S. 557 (1969). See *Paris Adult Theatre I v. Slaten*, No. 71-1051, June 21, 1973, ___ U.S. ___ (1973); *United States v. Orito*, No. 70-69, June 21, 1973, ___ U.S. ___ (1973); *United States v. 12 200-Ft. Reels Film*, No. 70-2, June 21, 1973, ___ U.S. ___ (1973).

With respect to Point III, the court did not err in authorizing the search because the standard employed was neither erroneous nor incorrect. The court's quoted standard comports favorably with the standards articulated in *Miller v. California*, No. 70-73, June 21, 1973, ___ U.S. ___ 1973.

Nor is there "an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all caes where allegedly obscene material is seized." *Heller v. New York*, No. 71-1043, l.c. 4, June 25, 1973, ___ U.S. ___ (1973). So far as the evidence in this case shows other than the conceded exception, defendants were accorded a prior adversary hearing. Officers purchased six publications and presented a box of publications previously in judicial custody for examination by the court. Only after that examination and judicial determination was the surrender order made, and the ultimate hearing was accorded beginning the same day. The procedure followed is consistent with that approved in *Heller v. New York*, supra.

With respect to Point IV, the court did not err in granting the injunction because it is not error not to require affirmative evidence of obscenity independent of the allegedly obscene publications themselves which were in evidence and were the best evidence of what they depict. *Paris Adult Theatre I v. Slaton*, supra; *Kaplan v. California*, No. 71-1422, June 21, 1973, ___ U.S. ___ (1973).

With respect to Point V, the court did not err in finding certain of the allegedly obscene material obscene. The court examined all the publications which were the best evidence of what they depicted, *Paris Adult Theatre I v. Slaton, supra, Kaplan v. California, supra;* and, in determining that certain of them were obscene, employed standards which comport favorably with those articulated in *Miller v. California, supra.* Appellant have not persuaded that the court's determination was erroneous; and their reliance on *Redrup v. New York, supra,* is misplaced because its procedure has been discredited. *Miller v. California, supra.* See also *Hoffman v. Dickinson Operating Co.*, 468 S.W. 2d 26[1] (Mo. 1971).

With respect to Point VI, the trial court did not err because Sections 563.280 and 563.285, RSMo 1969, as construed and applied, *Paris Adult Theatre I v. Slaton*, supra, are constitutional and are not overbroad in their provisions. The statutes deal with the same matters as does the ordinance approved in *Roth v. United States*, 354 U.S. 476 (1957), reaffirmed in *Miller v. California, supra*, and the ordinance of Kansas City determined to be constitutional in the City of Kansas City cases, supra.

Accordingly, this case is controlled by the recent decisions of the United States Supreme Court, summarized in the *City of Kansas City* cases, supra; and the judgment, except for the concededly erroneous prior restraint noted in connection with appellants' Point I, is affirmed.

Holman, J., concurs. Bardgett, P.J., concurs in result. Seiler, J., dissents in separate dissenting opinion filed.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE
No. 57240

STATE OF MISSOURI, ex rel. DEE WAMPLER,
Greene County Prosecuting Attorney,
Respondent,

v.

DICK and EDNA BIRD, GARY NEIL ROOT,
NANCY JEAN SOUTER and READERS BOOK
SERVICE, INC.,
Appellants.

Filed: October 8, 1973

DISSENTING OPINION

In my opinion, the Missouri obscenity statute, Sec. 563.280 RSMo 1969, is unconstitutional.

In *Miller v. California*, No. 70-73, decided June 21, 1973, the Supreme Court held that First Amendment values are adequately protected if the state law that regulates obscene material is limited, as written or construed, to the following considerations: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value (slip opinion, pp. 9-10).

The Missouri statute, as written and authoritatively construed, fails to define specifically the sexual conduct which must be depicted or described in the material to subject it to regulation under the statute, as required by Miller. The court in Miller gives two examples of the types of material a state statute may permissibly define and regulate (slip opinion p. 11):

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, execretory functions, and lewd exhibition of the genitals."

These descriptions of conduct are a far cry from the loose language of Sec. 563.280, supra, which regulates "lewd, licentious, indecent or lascivious" matter of an "indecent, immoral or scandalous character."

We have held that this statute is not unconstitutionally vague. *State v. Becker*, 364 Mo. 1079, 272 S.W. 2d 283 (Mo. 1954). However, the language of Miller requires this court to take a second look at the constitutionality of this statute.

I also dissent for the reason stated in my dissent in *City of Kansas City v. O'Connor et al.*, No. 57266, 57132 and 58133, also decided this date, that the state of Missouri has no legitimate interest under the freedom of speech clause of our own constitution, Art. I, Sec. 8, in censoring the films and publications available to consenting adults.

For these reasons I respectfully dissent.

Robert E. Seiler, Judge.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 472-73

HAMAR THEATRES, INC.,
Plaintiff,

v.

JOHN CRYAN, Individually and as Sheriff of Essex County, State of New Jersey, JOSEPH P. LORDI, Individually, and as County Prosecutor of the County of Essex, State of New Jersey, and GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey,
Defendants.

Civil Action No. 496-73

C & V THEATRE CORPORATION, and EDWARD N. WILSON, JR.,
Plaintiff,

v.

JAMES M. COLEMAN,JR. individually and as Monmouth County Prosecutor of Monmouth County, State of New Jersey, MALCOLM B. CARTON, as Assistant Prosecutor of Monmouth County, State of New Jersey and JOHN DOE whomever he may be, and GEORGE F. KUGLER, JR., Attorney General of N.J.,
Defendants.

Civil Action No. 585-73

HOWARD A. WEIN,
PHILIP J. GUARINO,

Plaintiffs,

v.

TOWN OF IRVINGTON, MUNICIPAL COURT OF THE TOWN OF IRVINGTON, TOWN OF IRVINGTON POLICE DEPARTMENT, BERNARD DeLUCIA, DETECTIVE, TOWN OF IRVINGTON POLICE DEPARTMENT, JOSEPH P. LORDI, ESSEX COUNTY PROSECUTOR and GEORGE F. KUGLER, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Defendants.

OPINION

Before: ADAMS, C. J., BARLOW, D.J. and GARTH, D.J.

Appearances:

MESSRS. PODVEY & SACHS
Attorneys for Plaintiff, Hamar Theatres, Inc.

MICHAEL S. SODOWICK, ESQ.
Attorney for Plaintiffs, C & V Theatre Corporation, et al

MESSRS. STERN & WEISS
Attorneys for Plaintiffs, Howard A. Wein, et al

GEORGE F. KUGLER, Attorney General of New Jersey,
By: David S. Baime, Deputy Attorney General,
For the State of New Jersey

JOSEPH P. LORDI, Essex County Prosecutor
By: RALPH J. JABBOUR, Assistant Prosecutor,
For John Cryan, et als

JAMES M. COLEMAN, Monmouth County Prosecutor
By: ALLEN MAC DUFFIE, JR., Assistant Prosecutor,
For James M. Coleman, Jr., et als

DANIEL A. ROSENBERG, Legal Assistant-Prosecutor,
For Town of Irvington, et als

GARTH, District Judge:

This action was commenced by the filing of three separate complaints in April of 1973,[1] all of which challenged the constitutionality of the New Jersey anti- obscenity statute, N.J.S. 2A:115-1, *et seq.* as well as procedures followed in each action by state, county or municipal authorities in seizing films or publications thought to be obscene. Jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). Following hearings on each of the three complaints concerning the necessity of convening three-judge panels, this three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284 to consider the three actions as a

[1] Hamar Theatres, Inc. v. Cryan *et al.*, Civ. No. 472-73, filed April 6, 1973; C & V Theatre Corporation v. Coleman *et al.*, Civ. No. 496-73, filed April 11, 1973; Wein & Guarino v. Town of Irvington *et al.*, Civ. No. 585-73, filed April 30, 1973.

consolidated matter.[2] A consolidated amended complaint was filed in July of 1973.

PARTIES

Plaintiff Hamar Theatres, Inc., a New Jersey corporation, operates a motion picture theatre known as the Treat Theatre in Newark, New Jersey. Hamar has in the past exhibited sexually oriented adult films and intends to continue such exhibitions in the future. It is uncontested that on April 5, 1973, a certain film entitled "Fast Ball" then being exhibited at the Treat Theatre, was seized by Essex County Sheriff's detectives under the direction of Essex County Sheriff John Cryan and Essex County Prosecutor Joseph P. Lordi, both defendants in this action. The films were seized pursuant to a search warrant issued by the Honorable Ralph L. Fusco, New Jersey Superior Court Judge, on the strength of an affidavit of a Sheriff's detective. Prior to the seizure, Judge Fusco had not seen the film. Moreover, no prior adversary hearing was held as to the propriety of the seizure. The search warrant mentioned no individuals and was not issued in conjunction with any criminal complaint. No criminal complaints or indictments were returned prior to the

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[2] Pending the hearing of the applications by a three-judge panel, defendants were restrained from instituting any contemplated criminal proceedings against the individual plaintiffs. Orders of April 27, 1973 and April 30, 1973. No restraints were issued against currently pending criminal prosecutions. When the three-judge panel convened on June 1, 1973, the restraining orders of April 27 and April 30 were continued as to the class of plaintiffs certified on that date. *See* opinion p. 5 *infra*. Following the decision of the United States Supreme Court in *Miller v. California*, 41 U.S.L.W. 4925 (U.S. June 21, 1973), the Essex County Prosecutor, joined by the State Attorney General, moved to vacate the then-existing restraints. Oral argument was heard on July 19, 1973, and decision reserved. The defendants' motion is denied in light of the determination herein.

commencement of Hamar's separate action (now consolidated herein) against the Essex County Sheriff, Prosecutor, and the New Jersey Attorney General.

Prior to the April 1973 seizure, plaintiff Hamar had experienced other film seizures by the Essex County authorities. As a result of a seizure in May 1972, plaintiff Hamar pleaded guilty to an accusation of "Maintaining a Nuisance, " On March 5, 1973, the film "Deep Throat" was seized by defendants under the authority of a Newark Municipal ordinance without a prior adversary hearing. Following alleged harassment by the defendants and the issuance of a federal court order restraining defendants from further harassment of the plaintiff Hamar, the plaintiff pleaded guilty to violations of the Newark Municipal ordinance dealing with obscenity. Although there are currently no criminal actions proceeding against Hamar, the past seizures have allegedly caused great perturbation among Hamar's employees and have disrupted its business.

Plaintiff Hamar intends to continue exhibition of the same genre of sexually oriented adult films. Among other relief, Hamar seeks a declaratory judgment invalidating the New Jersey anti-obscenity statute. Hamar also seeks an order enjoining the defendants from enforcing this anti-obscenity statute in any fashion, and in particular, a preliminary injunction prohibiting defendants from making unconstitutional seizure of the films it is and will be exhibiting.[3]

Plaintiff C & V Theatre Corporation also operates a theatre which exhibits sexually oriented adult films. On March 6, 1973, Monmouth County officers seized the film "Deep Throat", then being exhibited at its theater. A criminal prosecution against the plaintiff C & V has been commenced based upon the exhibition of "Deep Throat" and is currently

[3] Hamar also seeks to have its print of "Fast Ball" returned and to be awarded costs.

pending in the New Jersey state courts. No relief is sought here with respect to that seizure and criminal prosecution. Tr. June 1, 1973 at 18. Plaintiff C & V alleges, however, that subsequent to the "Deep Throat" incident, the Monmouth County officials who had been made defendants in C & V's initial separate complaint, and who now appear as defendants in the consolidated amended complaint, informed C & V that they would continue to review the sexually oriented adult films to be exhibited in plaintiff's theater and would seize films considered obscene with a view toward appropriate criminal proceedings. Plaintiff C & V seeks the same relief requested by the plaintiff Hamar.

Plaintiffs Wein and Guarino, are owners and operators of a book store known as "Best Adult Book Store" located in Essex County, Irvington, New Jersey, in which sexually oriented adult books, films, magazines and novelties are exhibited and sold. On April 25, 1973, it is alleged that a member of the Irvington Police Department, without advising plaintiffs that he was a police officer, purchased a magazine from defendants, left, and a few minutes later returned with some other police officers who this time identified themselves as such and demanded that plaintiffs return the marked bill with which the initial purchase of the magazine had been made. On April 26, 1973, plaintiffs were served with criminal complaints charging them with violations of the New Jersey anti-obscenity statute, which complaints are still pending. Tr. June 1, 1973 at 17, 18. Plaintiffs allege that they were told by the Deputy Chief of the Irvington Police Department that if they were to remain open for business, the Irvington Police Department would issue daily criminal complaints against them under the New Jersey anti-obscenity statute. Plaintiffs allege similar representations were made to them by other Irvington law enforcement officials. Plaintiffs seek basically the same relief against the Irvington municipal law enforcement officials, the Essex County Prosecutor and the Attorney General of New Jersey as is sought by the plaintiffs

Hamar and C & V against their respective defendants.[4] Plaintiffs Wein and Guarino also seek to restrain defendants from further prosecution of the criminal complaints presently outstanding against them.

To the extent that relief is sought by Wein and Guarino against the Town of Irvington, the Municipal Court of the Town of Irvington, and the Town of Irvington Police Department, this court has no jurisdiction under 42 U.S.C. § 1983 to consider the matter and these defendants shall be dismissed from the action. *City of Kenosha v. Bruno*, 41 U.S.L.W. 4819 (U.S. June 11, 1973).

At oral argument on June 1, 1973, all parties agreed that no evidence other than the stipulations already filed with the court, would be presented and that the June 1, 1973 argument would constitute the final hearing before the three-judge panel in this action.[5]

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[4] Allegations in Wein and Guarino's complaint pertaining to the seizure of novelties and a claim for damages were abandoned in oral argument before the panel on June 1, 1973. Tr. at 14-16.

[5] See Tr. of June 1, 1973, at 3.

The stipulation between the plaintiff Hamar Theatres and the defendants provides:

> "1. There is no uniform statewide policy regarding the seizure of allegedly obscene materials without a prior adversary hearing.
>
> 2. On April 5, 1973, at approximately 3:55 P.M., Sheriff's detectives, acting under the direction of defendants Cryan and Lordi, entered the Treat Theatre, Newark and seized the 35 mm color motion picture, "Fast Ball". This action was taken pursuant to a search warrant issued April 5, 1973, by the Honorable Ralph L. Fusco, Judge of the Superior Court of New Jersey. Judge Fusco issued the warrant after perusing the affidavit of Detective James Casey

Also at oral argument this panel granted a motion by the plaintiffs to proceed as a class with respect to the constitutionality of the challenged anti-obscenity statute. The panel denied so much of that motion as sought to establish or

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(Footnote 5 Continued)
of the Essex County Sheriff's Department (which affidavit purported to detail the contents of the motion picture, "Fast Ball"). The Judge did not view the film or hold an adversary hearing."

The stipulation between Wein and Guarino and the defendants provides:

> "1. There is no uniform statewide policy regarding seizure of allegedly obscene materials without a prior adversary hearing.
>
> 2. On April 25, 1973, a member of the Irvington Police Department purchased a magazine and three novelties from the Best Adult Book Store located at Prospect Avenue and 43rd Street, Irvington, New Jersey, for the sum of $10.51. The officer tendered a $10.00 bill and $1.00 bill to plaintiffs Wein and Guarino and received change. He then left the premises but returned a few minutes later with two other police officers who, after identifying themselves, told Wein and Guarino that they would [sic] charged for selling obscene material and asked that they appear at the police station at 10:00 A.M. the following day, April 26, 1973. They also advised them that the $10.00 bill was marked and demanded that it be returned to them which plaintiffs did.
>
> The following morning the materials were examined by Alfred R. Kinney, Judge of the Irvington Municipal Court who, after determining that there existed probable cause to believe that the materials were obscene and were sold by plaintiffs contrary to law, ordered that warrants issue for their arrest. Complaints were filed and served and Wein and

to have certified a class as to the allegedly illegal seizure procedures which were found to vary considerably in each case and thus to present different factual and legal issues best resolved on a case-by- case basis. The class certified by this panel under Rule 23 (b) (2) was the class of all movie theater operators in the State of New Jersey that exhibit "X"-rated and/or sexually oriented adult films and the class of all bookstore owners in the State of New Jersey that sell sexually oriented adult books and magazines.

STANDING

Defendants contend that the plaintiffs do not have standing to challenge the New Jersey anti-obscenity statute since the statute, as written, will not be enforced against the plaintiffs. After a three-judge panel for the District of New Jersey declared N.J.S. 2A:115-1.1 invalid on November 20, 1972 because of the failure of that statute to include "utterly without redeeming social value" in its definition of obscenity, *Cine-Com Theatres Eastern States, Inc. v. Lordi*, 351 F. Supp. 42 (D.N.J. 1972), the Attorney General of the State of New Jersey modified the State's enforcement policy so as to include the "social-value" test in the definition of obscenity when applying N.J.S.A. 2A:115-1 *et seq* to prosecutors' investigations, arrests and indictments.[6] Defendants argue that

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(Footnote 5 Continued)

Guarino were arraigned before Judge Kinney. They then entered pleas of not guilty and waived a preliminary hearing. The matter was thereafter referred to the Essex County Prosecutor's Office for presentment to the Essex County Grand Jury."

C & V reserved the right to adduce evidence with respect to seizure procedures should it become necessary. Tr. of June 1, 1973, at 12.

[6] Various ingenious justifications are offered by the defendants in defense of their reading the "social-value" test into N.J.S. 2A:115-1. 1 (Supp. 1973)in spite of the fact that this aspect of the definition of obscenity had been explicitly

since plaintiffs will be investigated, arrested and indicted under a standard which received constitutional approval in Cine-Com, and since all formal prosecutions will be held in abeyance pending the determination of *Cine-Com* which is now on appeal before the Third Circuit[7], plaintiffs are not subject to any direct injury as a result of the enforcement of the statute under the Attorney General's policy, and therefore, under the doctrine of *Poe v. Ullman*, 367 U.S. 497, 504 (1961), they do not have standing to challenge its validity.

Defendants' argument is without merit. Unlike the situation in *Poe v. Ullman*, in which Connecticut's anti-contraceptive statute had been enforced against only two doctors and one nurse (in 1940) since its enactment in 1879, and there existed no prospect of its enforcement against the plaintiffs therein, there is no question that New Jersey's anti-obscenity statute has been and will be enforced – under one interpretation or another – against the within plaintiffs. That the standard applied by the prosecutor's office under its new enforcement policy may be constitutional is irrelevant to the question of standing. Standing is accorded to petitioners to challenge a statute where they are subject to its enforcement, and where they can demonstrate that they are directly affected thereby. *Doe v. Bolton*, 41 U.S.L.W. 4233, 4236 (U.S. Jan. 22, 1973); *Epperson v. Arkansas*, 393 U.S. 97 (1968). The direct effect to which petitioners may be subject does not depend upon the constitutionality of the statute but rather upon the practical nexus between its enforcement and the petitioners' activities or livelihood; consideration of the constitutionality of the enforcement policy or the statute

(Footnote 6 Continued)
expunged by the New Jersey Legislature from the statute. *See Cine-Com, supra*, 351 F. Supp. at 48, 49; N.J.S. 2A:115-1.1a (Supp. 1973). The propriety of the State's new enforcement policy, in any event, does not bear upon the standing issue as the textual discussion will demonstrate.

[7] Tr. of June 1, 1973, at 36, 37, 56, 57.

itself must be reserved for the consideration of the case on its merits once the issue of standing has been independently resolved.

Plaintiffs herein have alleged sufficient facts to demonstrate that they will be directly and adversely affected by the continued enforcement of the statute in any guise, and are therefore entitled to standing.. See *Cine-Com, supra,* 351 F. Supp. at 44, 45. The fact that prosecutions may be held in abeyance under the present enforcement policy does not dilute the stake that the present plaintiffs have in the outcome of this litigation.[8] Investigations, seizures and indictments of theater operators and bookstore owners for the exhibition and/or sale of allegedly obscene materials possess, in themselves, a sufficient disruptive potential of plaintiffs' businesses to afford them standing. The pendency of such prosecutions in themselves may chill the exercise of First Amendment rights.

YOUNGER ABSTENTION

Defendants contend that at least with respect to three of the named plaintiffs, – C.& V Theatre Corporation, Wein and Guarino – this Court should defer to a State court determination of plaintiffs' claims as a matter of equitable abstention under *Younger v. Harris,* 401 U.S. 37 (1971). As

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[8] Should plaintiffs exercise their right to speedy trials under outstanding indictments held in abeyance, Strunk v. United States, 41 U.S.L.W. 4794 (U.S. June 11, 1973); Barko v. Wingo, 407 U.S. 514 (1972), they face the prospect – decreased, perhaps, since the Supreme Court's opinion in Miller v. California, 41 U.S.L.W. 4925 (U.S. June 25, 1973) – of an adverse judicial determination under an interpretation of the statute declared unconstitutional in *Cine-Com, supra, See, e.g.,* State v. Shapiro, Misc. Nos. 3064, 3077, ___ N.J. Super ___, ___ A.2d ___ (Law Div. Jan. 26, 1973).

to C & V, although in this action it does not challenge its pending prosecution by the State for its exhibition of "Deep Throat", defendants argue that it cannot thereby escape the logic of *Younger*. Defendants point out that C & V occupies the identical position occupied by Dr. Hallford in *Roe v. Wade*, 41 U.S. L.W. 4213, 4217 (U.S. Jan. 22, 1973). Dr Hallford in *Roe* had sought to "distinguish his status as a *present* state defendant from his status as a 'potential *future* defendant.' " The Supreme Court rejected that distinction and remitted Dr. Hallford to his defenses in the state criminal proceedings. Specifically, however, the Supreme Court did not consider the question of "what different result, if any, would follow, if Dr. Hallford's intervention were on behalf of a class." 41 U.S.L.W. at 4217 n. 7.

The fact that the present action in a class action nollified to a certain extent the usual *Younger* considerations. First, it should be noted that as to the plaintiff Hamar, *Younger* abstention is inappropriate since no criminal prosecution is pending against it.[9] *Lewis v. Kugler*, 446 F2d

[9] We regard the seizure of the film "Fast Ball" as an evidentiary seizure and not as the commencement of a prosecution in the *Younger* sense. The warrant did not name any individuals, nor was it issued in conjunction with any kind of criminal process. In such a situation, there is no assurance that an individual from whom such property is seized will have the opportunity to challenge the constitutionality of the state proceeding or the statute under which such seizure was authorized because no criminal proceeding may ensue. *See* Conover v. Montemuro, No. 71-1871, (3d Cir. filed Dec. 20, 1972), *resubmitted en banc March 29, 1973* (filed May 8, 1973). It is not sufficient to argue for purposes of *Younger* abstention that such individuals could raise these questions in state court proceedings for return of their property or for a declaratory judgment. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510 (1972); Zwickler v. Koota, 389 U.S. 241, 248 (1967). *Younger* has no application where no state prosecution is pending. Lewis v. Kugler, 446 F.2d 1343, 1347 (3d Cir. 1971).

1343 (3d Cir. 1971). It would prove anomalous to grant relief to Hamar and to the class of theater owners of which Hamar is a representative excepting therefrom only the plaintiff C & V as to future prosecutions merely because a prosecution is currently pending against it. Where such class relief is sought, it furthers the purposes of class adjudication to distinguish between C & V's status as a present criminal state defendant and its status as a potential future defendant. Relief may be prescribed as to the effect and validity of N.J.S. 2A:115-1 *et seq.* equally with respect to the class of all theater owners that exhibit sexually-oriented or "X"-rated adult films and all book store owners who sell sexually oriented adult books and magazines without interfering with the proper course of pending state prosecutions against individual plaintiffs by limiting such relief to *prospective* matters only. Restricting class relief in this fashion accommodates the interests of class adjudication on the one hand[10] without doing violence to the principles of comity on the other.[11]

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[10] The purport of Rule 23 (b) (2) of the Federal Rules of Civil Procedure is to render possible declaratory and/or injunctive relief as to an entire class where the question of the legality of behavior of one party (the State, for example) vis-a-vis that class is unsettled. *See* Advisory Committee Notes to 1966 Amendments of the F.R.C.P. That purpose would be thwarted to the extent that class relief would obtain for all members of the class except those with state prosecutions currently pending against them Assuming for the moment that this Court were to enjoing the future enforcement of the New Jersey anti-obscenity law against a class which did not include *"Younger"* plaintiffs, the State would still be free to prosecute such individuals in future prosecutions while at the same time it was enjoined from prosecuting all other members of the class. But as to future prosecutions, *"Younger"* plaintiffs stand in precisely the same status as do members of the class of those against whom future prosecutions may be imminent but against whom no present prosecutions are pending.

[11] We intimate no opinion here as to the propriety of such an accommodation were criminal proceedings pending against all the named representatives of the class.

As to the plaintiffs Wein and Guarino, they occupy a slightly different position than C & V since they actively seek an injunction against the prosecution currently pending against them. In view, however, of our accommodation of *Younger* interests to class action interests, we find this to be a "distinction without a difference." Relief may be granted with respect to prospective proceedings threatened against Wein and Guarino, but the plaintiffs Wein and Guarino will be remitted to their defenses in the pending state proceedings against them.[12]

PULLMAN ABSTENTION

Defendants argue that this Court should abstain from deciding the constitutionality of N.J.S. 2A:115-1.1 (Supp. 1973) under the doctrine enunciated by Justice Frankfurter in *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496 (1941) because the statute is susceptible to a "saving construction"

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[12] Plaintiff Wein and Guarino allege that the prosecutions have been instigated against them in bad faith so as not to secure valid convictions, but rather to put plaintiffs out of business. If supported by proper proofs, such allegations would present another exception to *Younger*, and no equitable abstention would need to be exercised with respect to pending state proceedings. The record presented before us, however, does not support such abstention. As was stated in Lewis v. Kugler, 446 F.2d 1343, 1349 (3d Cir. 1971); "There is no indication that defense of the state criminal prosecution will not assure adequate vindication of their [the plaintiffs in the federal action] constitutional rights. The injury that they face is solely 'that incidental to every criminal proceeding brought lawfully and in good faith,' and they are therefore not entitled to equitable relief."

The issue of illegal seizure (Lee Art Theatre v. Virginia, 392 U.S. 636 (1968) and, most recently, Roaden v. Kentucky, 41 U.S.L.W. 5070 (U.S. June 25, 1973)) must also be raised in the state criminal proceedings by plaintiffs Wein and Guarino.

that would avoid or modify the constitutional question presented.[13] On November 20, 1972, a three-judge panel for the District of New Jersey invalidated the identical statute challenged here, and in so doing, determined that *Pullman*-type abstention was not appropriate. *Cine-Com Theatres Eastern States, Inc. v. Lordi*, 351 F. Supp. 42 (D.N.J. 1972). In *Cine-Com*, the Court found that the New Jersey Legislature had explicitly expunged from its definition of obscenity in N.J.S. 2A:115-1.1 (Supp. 1973) the requirement that to be obscene published material had to be "utterly without redeeming social value" [hereinafter termed the *"Memoirs* social-value requirement or test"]. The Court premised its determination on a specific legislative finding incorporated into the statute to the effect that the Legislature did not believe tha the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1967),[14] expressed the

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[13] N.J.S. 2A:115-1.1 (Supp. 1973) provides:

"Obscene" defined

The word "obscene" wherever it appears in the chapter to which this act is a supplement shall mean that which to the average person, applying contemporary community standards, when considered as a whole, has as its dominant theme or purpose an appeal to prurient interest.
Amended by L.1971, c. 449, § 3, eff. Feb. 16, 1972."

[14] "Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."
U.S. at 418.

proper Constitutional standard, and that in order to facilitate obscenity prosecutions, the Legislature could constitutionally strike the *Memoirs* social-value requirement from its definition of obscenity. *Cine-Com, supra,* 351 F. Supp. at 47-49; N.J.S. 2A:115-1.1a.[15] The *Cine-Com* court concluded:

> "The statute is thus susceptible to only one interpretation, an interpretation which rejects the social-value test. Since no New Jersey court could thus interpret the statute so as to avoid the constitutional question, abstention is improper, and it is the duty of the federal court to decide whether or not the statute is constitutional."

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[15] N.J.S. 2A:115-1.1a (Supp. 1973) provides:

"Legislative findings

The Legislature finds that the standards of obscenity now enunciated in chapter 115 of Title 2A of the New Jersey Statutes as amended and supplemented in recent years is unnecessarily permissive and a hindrance to effective legal action against obscene matter. The Legislature further finds that such unnecessary permissiveness has resulted from the incorporation into New Jersey Statutes of language from influential opinions authored by certain United States Supreme Court justices; which language, however, does not represent binding majority decisions of the Supreme Court and, accordingly, need not bind the Legislature or the Judiciary of this State. The Legislature further finds that the most recent binding definition of 'obscenity' enunciated by the United States Supreme Court is represented by section 1 of chapter 165, laws of 1962, prior to subsequent amendments; and that said subsequent amendments ought to be repealed in order to establish a workable definition of 'obscenity' within the framework of our statutory law and that certain other changes should be made in other statutes for the purpose of consistency.

L.1971, c. 449, § 2, eff. Feb. 16, 1972."

Cine-Com, supra, 351 F. Supp. at 49.

Since the filing of the *Cine-Com* decision, the United States Supreme Court has promulgated a new defintion of obscenity in *Miller v. California*, 41 U.S.L.W. 4925 (U.S. June 21, 1973), and *Paris Adult Theatre I v. Slaton*, 41 U.S.L.W. 4935 (U.S. June 21, 1973). Moreover, prior to the adoption of a new definition of obscenity by the United States Supreme Court but subsequent to the decision in *Cine-Com*, a New Jersey Chancery Court construed N.J.S. 2A:115-1.1 as defining obscenity according to the three prong test set forth in *Memoris, supra. Coleman v. Wilson*, ___N.J. Super.___ ___A.2d___, No. C-2344-72 (Ch. March 21, 1973).[16] These

[16] N.J.S. 2A:115-1.1 (Supp. 1973) was construed in Coleman v. Wilson to define as obscene only such matter:

> "(a) the dominant theme of which taking the matter as a whole appeals to a prurient interest in sex;
> (b) is patently offensive because it affronts contemporary community (nation-wide) standards relating to the description or representation of sexual matters; and
> (c) is utterly without redeeming social value."

Coleman v. Wilson, supra, slip op. at 9.

In State v. Shapiro, ___ N.J. Super. ___, ___ A.2d ___, Misc. Nos. 3064, 3077 (Law Div. Jan. 26, 1973), also decided subsequent to *Cine-Com* and prior to the Supreme Court's promulgation of a new obscenity standard, Judge McGann of the Monmouth County Superior Court construed N.J.S. 2A:115-1.1 (Supp. 1973) as excluding the *Memoirs* social-value requirement but concluded that no such social-value requirement was constitutionally required. Judge Lane of the Monmouth County Chancery Division in *Coleman v. Wilson, supra*, had determined that without the *Memoirs* social-value requirement, N.J.S. 2A:115-1.1 (Supp. 1973) would be unconstitutional.

new decisions merit a reconsideration of the *Pullman*-abstention determination in *Cine-Com.*[17]

In *Miller v. California, supra,* the Supreme Court redefined obscenity as follows:

> "The basic guideline for the trier of fact must be (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. *Kois v. Wisconsin, supra,* 408 U.S. at 230 (1972), quoting *Roth v. United States, supra,* 354 U.S. at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

41 U.S.L.W. at 4928. The Court explicitly rejected the *Memoirs* "utterly without redeeming social value test" and in its stead adopted a new "social-value" test – "whether the work taken as a whole lacks serious literary, artistic, political, or scientific value" [hereinafter referred to, for the purposes of this opinion, as the *Miller* social-value test]. "At a minimum," said the Court, "prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection." *Id.*

In comparing the three-prong definition of *Memoirs* (*See* note 14 *supra*) with that of *Miller,* we note another significant difference. The *Miller* definition, unlike that in *Memoirs,* requires that to be obscene, material must depict or

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[17] The Supreme Court decisions in *Miller* and *Paris Adult Theatre I* were handed down subsequent to oral argument in this matter. The Court thereupon requested additional submissions from the parties as to the effect of these decisions upon the challenge to the statute.

describe, in a patently offensive way, *"sexual conduct specifically defined by the applicable state law"* (emphasis supplied). Possible examples of what a state could define as sexual conduct under the second prong of the *Miller* definition are set forth in the opinion:

> "(a) Patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

41 U.S.L.W. at 4928. These definitions are only meant to be examples of the kinds of explicit description of sexual conduct required as a constitutional minimum in any regulation of purportedly obscene materials and do not foreclose states from adopting their own definitions, if sufficiently explicit.

For purposes of *Pullman*-abstention, we shall inquire then as to whether N.J.S. 2A:115-1.1 (Supp. 1973) can reasonably be construed to embody the *Miller* definition of obscenity.[18] Defendants contend that the primary intent of

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[18] Defendants' argument that if the present definition of obscenity in N.J.S. 2A:115-1.1 (Supp. 1973) (*see* note 13 *supra*) is found to be unconstitutional, the prior definition (incorporating the *Memoirs* standard) springs back into existence is without merit. That argument relies upon an analogy to certain old New Jersey cases holding that where a statute completely repealing a prior law is itself repealed, the original act is thereby revived. In re Lippincott, 119 N.J. Eq. 343, 182 A. 622 (Ch. 1936); Wallace v. Bradshaw, 54 N.J.L. 175, 23 A. 759 (E. & A. 1891). These cases have been overruled by N.J.S. 1:1-3.2, enacted in 1960.

Defendants' "severance" argument (*see* N.J.S. 2A:115-1.5) is also without merit. Should the definition of obscenity be found unconstitutional, the operative sections of the statute depending upon that definition will also fall.

the New Jersey Legislature in enacting N.J.S. 2A:115-1.1 was to "proscribe obscene matter to the fullest extent possible under the First Amendment." Defendant's brief at 41. It was this construction of legislative intent, say the defendants, that led Judge Lane in *Coleman v. Wilson, supra,* to construe N.J.S. 2A:115-1.1 in conformity with what was then judged to be the constitutional standard – the three-prong definition in *Memoirs.*[19] Accordingly, argue the defendants, the statute is now susceptible to a construction in keeping with the new definition in *Miller.*

As a matter of statutory construction in certain circumstances, we agree that a statute can be construed to embody a constitutional formulation subsequently promulgated by the Supreme Court. For example, after the *Memoirs* decision, various courts construed state statutes which adopted the definition of obscenity first set forth in *Roth v. United States,* 354 U.S. 476 (1957)[20] so as to comport with the three-prong test of *Memoirs.*[21] *See, e.g., Entertainment Ventures, Inc. v. Brewer,* 306 F. Supp. 802, 814, 815 (M.D. Ala. 1969) (three-judge court); Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969) (three-judge court), *reversed on other grounds sub nom. Perez v. Ledesma,* 401 U.S. 82 (1971); *Great Speckled Bird v. Stynchcombe,* 298 F. Supp. 1291, 1292 (N.D. Ga. 1969) (three-judge court). The basis of construing the *Roth* language as embodying the *Memoirs* standard in all the above cases was that the Supreme Court had stated in *Memoirs* that the three-prong *Memoirs* test had always been part of *Roth.* 386

[19] *See* note 14 *supra.*

[20] "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

[21] *See* note 14 *supra.*

U.S. at 418, 419. In construing the state statutes containing *Roth* language as embodying the *Memoirs* definition, the various courts referred to above merely adopted the construction already adopted by the Supreme Court of the the *Roth* language.

The present situation, however, is not quite apposite. In the first instance, the Supreme Court in *Miller* does not contend that the *Miller* definition is inherent in or embodied in *Roth* or in any other previous definition of obscenity. Second, as the statutory and legislative history of N.J.S. 2A:115-1.1 demonstrates, the *Roth* language adopted in the New Jersey statute is not susceptible even to the *Memoirs* construction, because, as was determined in *Cine-Com*, the New Jersey Legislature turned its back on *Memoirs* with the specific intent of excluding what it regarded as the too-permissive *Memoirs* standard. *Cine-Com, supra,* 342 F. Supp. at 49.

When the present definition of obscenity was adopted by the New Jersey Legislature in L. 1971, c. 449, the law contained a statement of legislative purpose as follows:

> "The 1971 amendment deleted former subsection (b). L. 1971, c. 449, contained a statement which read as follows:
>
> 'In 1957, the United States Supreme Court enunciated (in *Roth v. United States,* 354 U.S. the only definition of 'obscenity' in which a majority of its members have ever concurred – viz., that the 'obscene' is that which predominately 'appeals to prurient interest.' In 1962, this Legislature, in two acts, incorporated that definition into our statutes (where it had previously stood undefined). In nearly identical language, P.L. 1962, c. 165, § 1 and P.L. 1962, c. 166 § 2 defined the term as follows:

'The word 'obscene' . . . shall mean that which to the average person, applying contemporary, community standards, when considered as a whole, has as its dominant theme or purpose an appeal to prurient interest..'

Since then the Federal Supreme Court has fragmented in deciding several obscenity cases, agreeing upon results, but unable to reach a single opinion commanding majority agreement. Such nonmajority opinions do not constitute law binding upon lower courts. In 1966, however, one such binding opinion proved highly influential; in that opinion (in the so-called 'Fanny Hill' case, 383 U.S. 413) three justices proposed that the test of 'obscenity' should comprise three elements, 'prurient appeal' being only one of them. The other two tests were those which have become known as the 'patent offensiveness' and 'social value' tests. Some States – New Jersey included – hastened to incorporate these supposed 'tests' into their statutory law, without reflecting that (a) if the tests were part of a binding Supreme Court decision they were already the 'law of the land' without further action, and (b) if they were not already thus binding, their enactment would unnecessarily hinder law enforcement.

Subsequent experience has shown that the additional 'tests's' – particularly that which requires that an item be 'utterly without redeeming social value' – erect an almost insuperable barrier to prosecution, and allow the most objectionable materials to circulate unhampered. Meanwhile, other jurisdictions, which never adopted the added 'tests,' have been able to make convictions stick. Recently, for example, the United States Supreme Court

refused to reverse a Maryland adjudication of the obscenity of a film – the same film which a New Jersey Superior Court judge in 1969 'reluctantly and with regret' found it necessary to rule not obscene because it 'does possess a modicum of social value.'

This bill would return New Jersey law to the pre-1966 standard – a standard which is constitutionally viable and which would permit action to be taken against the accumulating flood of salacious films and literature which in recent years has seriously alarmed our citizens.

To conform to the reestablished standard, this bill would also repeal P.L. 1966, c. 199, § 2 (C. 2A:115-1.2), which merely established a rule of evidence concerning the 'social value' test; and P.L. 1962, c. 166, § 2 (C. 2A:115-1.1), which is a needless duplication of language already found in P.L. 1962, c. 165, § 1 and applying to all of chapter 115 in Title 2A."

N.J.S. 2A:115-1.1 (Supp. 1973) (legislative commentary).

This legislative statement demonstrates that the New Jersey Legislature wished to define obscenity in N.J.S. 2A:115-1.1 (Supp. 1973) in accordance with the first prong of the *Memoirs* definition to the exclusion of the other two prongs.[22] It is apparent that the first prong of *Memoirs*, the first prong of *Miller*, and N.J.S. 2A:115-1.1 (Supp. 1973), as the New Jersey Legislature has intended it to be construed

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[22] The "patently offensive" test and the "social-value" test which are rejected in the legislative commentary to N.J.S. 2A:115-1.1 (Supp. 1973) are the second and third prongs, respectively, of the *Memoirs* definition. *See* note 14 *supra*.

contain the identical definition of obscenity.[23] In effect, the New Jersey Legislature has stated that to be obscene, it will suffice under N.J.S. 2A:115-1.1 (Supp. 1973), if the material taken as a whole, appeals to the prurient interest without more. In the first instance, therefore, the statute cannot be construed as embodying either the *Memoirs* or *Miller* social-value test. To so construe the statute would imply that those two tests were embodied in the first prong of the definition in *Memoirs* and *Miller* respectively, but such a construction would render entirely superfluous the third prongs of *Memoirs* and *Miller* which contain the respective social-value tests.[24]

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[23] In his dissent in the companion case to *Miller*, Justice Brennan observed:

> "The difference between this formulation [that in *Miller*] and the three- pronged *Memoirs* test are, for the most part, academic. The first element of the Court's test is virtually identical to the *Memoirs* requirement that 'the dominant them of the material taken as a whole [must appeal] to a prurient interest in sex.'"

Paris Adult Theatre I v. Slaton, 41 U.S.L.W. 4935, 4949, 4950 (U.S. June 25, 1973).

[24] Judge McGann in State v. Shapiro, Misc. Nos. 3064, 3077, slip op. 14 (Law Div. Jan. 26, 1973), argues that "literary, scientific or artistic values are comprehended in the *dominant theme* requirement of *Roth.*" *See* note 20 *supra.* However, in construing N.J.S. 2A:115-1.1 (Supp. 1973), we do not construe *Roth*, but rather language adopted after the New Jersey Legislature rejected the three-pronged *Memoirs* definition of obscenity with the specific intent to exclude the possibility that material with literary, scientific or artistic merit could still be protected if its dominant theme appealed to the prurient interest. It will be recalled that in enacting N.J.S. 2A:115-1.1 (Supp. 1973), the Legislature had reacted

For much the same reason, N.J.S. 2A:115-1.1 (Supp. 1973) cannot be construed to include the "patently offensive" test embodied in the second prong of *Memoirs* and carried forward in a more exacting fashion as the second prong of *Miller*. Proscribed under N.J.S. 2A:115-1.1 (Supp. 1973) as a result, are materials which taken as a whole appeal to the prurient interest, but which may not depict or describe in a patently offensive way sexual conduct. On this basis alone, no construction of the New Jersey Statute could satisfy the *Miller* standard. Moreover, we point out that nowhere does the New Jersey Statute specifically define the sexual conduct the description or depiction of which is to be proscribed as also required in the second prong of *Miller*.[25] no such construction of the New Jersey Statute is possible because the New Jersey Legislature by the exclusion of the second and third prongs of *Memoirs* from its definition of obscenity has purposefully adopted a generalized statute.[26]

(Footnote 24 Continued)
to the result in Lordi v. UA New Jersey Theatres, Inc. 108 N.J. Super. 19, 259 A.2d 734, 742 (Ch. 1969) in which the court "reluctantly and with regret" found it necessary to rule the film "I am Curious Yellow" not obscene because it "does possess a modicum of social value." *See* Legislative Commentary quoted in full at pp. 11 and 12 of the text. In the *UA New Jersey Theatres* case, the court found that the dominant theme of the film, taken as a whole, appealed to the prurient interest, that the film was patently offensive because it affronted contemporary community standards relating to the description or representation of sexual matters, but because the film contained social value, it was not obscene. 259 A2d at 738, 739. The New Jersey Legislature wished to ban such a film, and to that end, it struck the social-value requirement in the third prong of the *Memoirs* definition. It is therefore wholly inconsistent with the Legislative intent to construe the social-value requirement as being inherent in the "dominant theme" language of N.J.S. 2A:115-1.1 (Supp. 1973).

[25] Miller v. California, *supra*, 41 U.S.L.W. at 4927 n. 6.

[26] Paris Adult Theatre I v. Slaton, *supra*, 41 U.S.L.W. at 4949 n. 13 (Brennan, J., dissenting).

A construction of N.J.S. 2A:115-1.1 (Supp. 1973) embodying the *Miller* standard would have to stand upon the premise that a state can enact a statute which, although specifically intending to proscribe certain sexually-oriented material, would "intend" to proscribe something less if the standard it had intended to create turned out to be unconstitutional. To permit this kind of statutory construction, however, is equivalent to condoning a criminal statute that would prohibit "all expression not permitted by the First Amendment."[27] The offense to due process inherent in such a vague legislative enactment is apparent.[28] For the purpose of determining the propriety of *Pullman* abstention, we cannot subscribe to the view that N.J.S. 2A:115-1.1 (Supp. 1973) can be construed to forbid obscenity to the fullest permissible extent.

Defendants finally argue that even assuming that the construction given to N.J.S. 2A:115-1.1 (Supp. 1973) in *Coleman v. Wilson, supra,* is not justifiable, it is possible that the New Jersey Supreme Court could adopt the construction adopted in *Coleman* and thus find that the New Jersey anti-obscenity statute comports with the constitutional

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[27] It is in this spirit that the New Jersey Chancery Court read the *Memoirs* social-value test back into N.J.S. 2A:115-1.1 (Supp. 1973), after admitting that it had been literally expunged: "The intention of the Legislature was to forbid obscene matter to the fullest extent permissible under the First Amendment." *Coleman v. Wilson, supra,* slip op. at 8.

[28] In addition to the due process problem inherent in such a construction, as a practical matter, to permit such a construction would effectively dictate abstention in every instance, since a state statute so construed would always be susceptible to a constitutional construction. We find it difficult to believe that the *Pullman* doctrine was intended to enable a state thus to insulate its statutes from constitutional review by federal courts.

requirements of *Miller*. In such a case, defendants are correct in saying that the statute so construed, would mean what the New Jersey Supreme Court said it meant and thus would be free from any constitutional infirmity.

It is true, as Justice Frankfurter said with respect to a federal court's construction of a state statute, that "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." *Railroad Comm'n v. Pullman Co.*, 312 U.S. at 498. In *Pullman*-abstention situations, the inquiry of the federal court is inexorably reduced to a forecast or prediction of the possible constructions of the statute in question that are available to state courts. As seen above, we have already concluded, as a matter of *prediction*, as did the federal court in *Cine-Com*, that the state courts cannot give a saving construction to N.J.S. 2A:115-1.1 (Supp. 1973). How then is the fact that the State Chancery Court in *Coleman* proved *Cine-Com's* "prediction" wrong to affect this Court's prediction of the kind of construction available for N.J.S. 2A:115-1.1 (Supp. 1973) in light of *Miller*? Our answer is that we are not in a very much different situation than was the Court in *Cine-Com* at which time no state court had construed the statute. First, since the decision in *Miller*, no state court has, in fact, construed the statute. Second, although on the one hand *Coleman construed the New Jersey anti-obscenity law as Cine-Com* predicted it could not be construed, another state court in *State v. Shapiro*, _____ N.J. Super. _____, ____ A.2d _____, Misc. Nos. 3064, 3077 (Law Div. Jan. 26, 1973) vindicated *Cine-Com's* prediction by concluding that N.J.S. 2A: 115-1.1 (Supp. 1973) intended to exclude the *Memoirs* social-value test.[29] Thus, as the situation stands now, the lower State Courts are divided, the statute

[29] The *Shapiro* court concluded, however, that N.J.S. 2A:115-1.1 (Supp. 1973) was constitutional without the presence of a "redeeming social value test." *See* note 16 *supra*.

has not yet been construed by the Appellate Division in New Jersey, and there is little likelihood of a definitive adjudication from the New Jersey Supreme Court before 1974. We observe that the mere pendency of state proceedings that could settle the issue presented to the federal court does not mandate *Pullman*-abstention. *Gibson v. Berryhill*, 41 U.S.L.W. 4576, 4581 (U.S. May 7, 1973). This being a First Amendment situation where delay could chill protected expression and all other factors being equal, the balance weighs against abstention. In a situation such as this, the Court is relegated to the same guidelines for predicting what reasonable statutory construction may be arrived at as it would had no lower court cases been decided.

A federal court cannot obstain on *Pullman* grounds merely because there exists the distant possibility that a state court will construe a statute so as to avoid a constitutional issue. That distant possibility is present in every case, and if it justifies abstention, then no federal court would ever be called upon to decide the constitutionality of a state statute. Such was not the plain meaning inherent in the scheme establishing review by federal courts of the constitutionality of state statutes. 28 U.S.C. §§ 2201, 2284. The rule of *Pullman*-abstention must be predicated upon a prediction by the federal courts that there exists not a distant possibility but rather a reasonable likelihood that a state statute can be construed in a manner which avoids the constitutional issue. We find that the construction suggested by defendants of N.J.S. 2A:115-1.1 (Supp. 1973) is not reasonably likely to obtain in the future. As the cases make clear, where no reasonable likelihood of a saving construction exists, it is incumbent upon a federal court to decide the constitutional issue, especially where First Amendment rights weigh in the balance and may be adversely affected by delay.[30] *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

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[30] Defendants argue that as a matter of comity to the Third Circuit, this Court should abstain from its determination, or stay these proceedings, pending the

CONSTITUTIONALITY OF THE STATUTE

The three-judge court in *Cine-Com, supra,* 351 F. Supp. at 50 held:

> "Until *Memoirs* is explicitly overruled by the Supreme Court or by Constitutional Amendment, it sets the Constitutional standard. Under its holding, the present New Jersey definition of obscenity, N.J.S. 2A:115-1.1 (Supp. 1972) cannot stand."

Now *Miller v. California,* has explicitly overruled *Memoirs* and has established a new standard for obscenity. However, for the reasons set forth in the discussion on Pullman-abstention above, N.J.S. 2A:115-1.1 (Supp. 1973) has no more of a claim to constitutional validity in light of *Miller* than it did when evaluated against the definition of obscenity in *Memoirs.* In sum, we hold that N.J.S. 2A:115-1.1 (Supp. 1973) is unconstitutional because (1) it would proscribe material that possessed serious literary, artistic, political or scientific value; (2) it would proscribe material that did not depict or describe sexual conduct in a patently offensive manner; and (3) it cannot be construed as *specifying* the kind of sexual conduct the depiction of which can be proscribed under *Miller*. To the extent that New Jersey's anti-obscenity laws depend upon the definition of obscenity therein, those laws are unconstitutional. No opinion is expressed, however, with respect to the constitutionality of New Jersey's anti-obscenity laws as applied to minors since the propriety of

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(Footnote 30 Continued)
outcome of the appeal in Cine-Com Theatres Eastern States, Inc. v. Lordi, 351 F. Supp. 42 (D.N.J.). We see no useful purpose served by delaying this decision, especially in view of its First Amendment character and the potential harm that delay might bring about. Moreover, we know of no principle of comity that dictates reserving decision or staying proceedings in such circumstances.

those laws and their enforcement against minors is not challenged in the present action.[32]

RELIEF

Pending the filing of this opinion, the State of New Jersey has been restrained from enforcing N.J.S. 2A:115-1.1 (Supp. 1973) against the within class of plaintiffs.[33] From the flurry of prosecutorial activity against allegedly obscene materials that precipitated this action and gave rise to the presently existing restraints, it would appear that plaintiffs will suffer irreparable harm if an injunction is not issued. Accordingly, defendants, their agents and all persons acting in active concert with them or subject to their supervision or control shall be restrained from instituting or prosecuting any action, proceeding or prosecution against the within class of plaintiffs under the New Jersey anti-obscenity law herein declared to be unconstitutional and of no effect. This injunction shall not extend, however, to the criminal prosecutions currently pending against the plaintiffs C & V, Wein and Guarino, nor to any criminal proceedings pending against any other plaintiffs in the within class as of June 1, 1973, the date on which the class was certified. Defendants shall likewise be restrained from instituting any civil proceedings or seizures pursuant to or under the authority of N.J.S. 2A:115-1.1 (Supp. 1973).

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[31] We intimate no opinion here as to the constitutionality of any municipal ordinances that purport to deal with obscene materials, since the propriety of such ordinances is not challenged in the pleadings, and in any event, would not properly be before us. Moody v. Flowers, 387 U.S. 97 (1967).

[32] This decision therefore has no effect upon N.J.S. 2A:115-1.7(a) (Supp. 1973).

[33] Order effective June 1, 1973; filed July 6, 1973.

The individual named plaintiffs herein, not proceeding as a class,[34] have also sought a ruling as to the constitutionality of book and film seizures. As to seizures effected under the authority of the New Jersey anti-obscenity statute declared invalid herein, the individual plaintiffs are adequately protected. As to seizures otherwise authorized, however, such as those pursuant to municipal anti-obscenity ordinances the validity of which have not been passed upon here,[35] a different issue is raised. We noted earlier that the prospective claims of the plaintiffs C & V, Wein and Guarino could be recognized in spite of the pendency of state criminal proceedings against them because of the class action nature of the challenge to New Jersey's anti-obscenity law.[36] With respect to the challenge to seizure procedures, however, no class has been certified,[37] and therefore, as to plaintiffs C &V, Wein and Guarino, this court must abstain on *Younger* grounds. *Roe v. Wade*, 41 U.S.L.W. 4213, 4217 (U.S. Jan. 22, 1973).[38]

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[34] No class has been certified as to the challenge made against seizure procedures. *See* p. 5 of the text.

[35] *See* note 31 *supra*.

[36] *See* pp. 7-8 of the text.

[37] *See* note 34 *supra*.

[38] Abstention with respect to C & V, Wein, and Guarino is *Younger* abstention:

> "It is not abstention in the Pullman sense, because it involves a decision on the merits of the claim for equitable relief that there is an adequate remedy at law in the state courts and that therefore federal equitable relief is inappropriate."

Conover v. Montemuro, No. 71-1871, slip op. at 11 (3d Cir. filed Dec. 20, 1972), *resubmitted en banc, March 29, 1973*, (filed May 8, 1973). Since we are not dealing here with *Pullman* abstention, this Court need not retain jurisdiction of the matter. *Compare* American Trial Lawyers Ass'n v. New Jersey Supreme Court, 41 U.S.L.W. 3391 (U.S. Jan. 15, 1973) (per curiam).

As to the application by the plaintiff Hamar for the return of its film seized by the defendants, no state criminal proceedings are pending. Because the statute under which plaintiff's sole copy of its film was seized has now been declared unconstitutional by this court, the seizure is improper and the film must be returned to the plaintiffs. Defendants shall have one week from the filing of this opinion to make a copy of the film for evidential purposes before returning it to the plaintiff Hamar. The procedure adopted here is designed to accord with the view recently taken by the Supreme Court in *Heller v. New York*, 41 U.S.L.W. 5067 (U.S. June 25, 1973).

An order shall be submitted consistent with this opinion, consented to as to form by all parties, within two weeks. No costs will be granted.

DATED: July 26, 1973

/s/ GEORGE H. BARLOW
District Judge
/s/ LEONARD I. GARTH,
District Judge

ADAMS, *Circuit Judge*, dissenting:

The doctrine of abstention enunciated in *Railroad Comm'n v. Pullman Co.*[1]a admonishes that, under certain circumstances, a federal court should postpone resolution of a challenge to the constitutionality of a state statute until there has been a definitive construction of that statute by the state court.[2]a

In making the determination whether to abstain, a court must engage in a balancing of weighty concerns. On the side of abstention is the possibility that the construction rendered by the state court would avoid or modify the constitutional challenge posed. By deferring its decision, the federal court might avert having to "mak[e] a tentative answer [on the meaning of the state statute] which may be displaced tomorrow by a state adjudication."[3]a Beyond canons of sound judicial procedure, abstention serves the important national interest in "the avoidance of needless friction with state policies,"[4]a and a "scrupulous regard for the rightful independence of the state governments."[5]a

Against these considerations weigh the claims of the particular litigant who has properly invoked the jurisdiction of

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[1]a 312 U.S. 496 (1941).

[2]a *See e.g.* Harrison v. NAACP, 360 U.S. 167 (1959).

[3]a Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941).

[4]a *Id.*

[5]a *Id.* at 501 *quoting* DiGiovanni v. Camden Ins. Ass'n. 296 U.S. 64, 73 (1935).

the federal court and who would possibly be subjected to extensive delay were the federal court to abstain.[6]a

Analyzing the facts present here and then sorting them into the two receptacles of the scale dictates that this Court, at least at this time, stay its hand.

The factors in favor of an immediate decision of this matter are not preponderant. The state has agreed that an interpretation by the highest state court of the obscenity statute here assailed will be expeditiously sought, and expects that oral argument will be held in September. Moreover, during the pendency of the state proceedings, the Attorney-General of New Jersey has indicated at oral argument that prosecutions will not be processed. These two items clearly diminish the possibility that the plaintiffs or members of their class, will be injured by the federal court's decision to abstain.

Compared to the elements militating against abstention, those suggesting that abstention is proper loom large. The Superior Court of New Jersey has recently interpreted the statute in question in a fashion which, but for intervening facts, would have avoided assaults on the constitutionality of the statute.[7]a Although the decision of the New Jersey tribunal is not a final, definitive interpretation of the statute, it illustrates the flexibility in statutory construction permitted to the courts of the state.

More importantly, on June 21, 1973, the United States Supreme Court decided *Miller v. California.*[8]a In that case, a majority of the Court, for the first rime since *Roth v.*

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[6]a *See* Zwickler v. Koota, 389 U.S. 241, 248 (1967). *Cf.* England v. Louisiana State Bd. of Medical Examiners. 375 U.S. 411 (1964).

[7]a Coleman v. Wilson, 301 A.2d 555 (N.J. Super. 1973).

[8]a 41 U.S.L.W. 4925 (U.S. June 21, 1973).

United States,[9]a "agree[d] on a standard to determine what constitutes obscene, pornographic material subject to regulation under the State's police power."[10]a

The standard established in *Miller* represented a change from the earlier pattern against which most states had enacted and interpreted their statutes. The Supreme Court recognized this variance yet made clear that new legislation was not necessarily required from the states. Rather, statutes "authoritatively construed"[11]a to comport with the new standards would be deemed acceptable.[12]a

This Court cannot "authoritatively construe" the New Jersey obscenity statute. The highest court of New Jersey can do just that.[13]a

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[9]a 354 U.S. 476 (1957).

[10]a 41 U.S.L.W. at 4927.

[11]a *Id.*

[12]a "We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate." *Id.*, n. 6.

[13]a In United States v. 12 200-ft Reels of Super 8mm. Film, 41 U.S.L.W. 4961 (U.S. June 21, 1973), the Supreme Court clearly indicated that the interpretation of the statute should be made by the state court.

> "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes . . ." 41 U.S.L.W. at 4963, n. 7.

A salutary rule of caution is the wise and ancient doctrine that a court not adjudge the validity of a statute except for manifest necessity, and that every doubt be explored and extinguished before moving to that grave conclusion. Because of this principle and the specific facts in this case, which in my judgment do not demand immediate decision, abstention is especially appropriate here.[14a]

[14a] In deciding to abstain, I would retain jurisdiction of this case pending disposition by the state court system. *See* Zwickler v. Koota, 389 U.S. 241, 244-5 n. 4 (1967). If undue delay developed, the court could then proceed with an adjudication.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION ,

CIVIL NO. 4849

JERRY McCRIGHT, Operator and Manager of the ADULT BOOK STORE, and INTERNATIONAL AMUSEMENTS, LTD., a Delaware Corporation,

Plaintiff(s),

v.

ALLEN I. OLSON, in His Official Capacity as Attorney General for the State of North Dakota; and JOHN O. GARAAS, in His Official Capacity as County Attorney for the County of Cass, North Dakota,

Defendant(s).

NOTICE OF ENTRY OF MEMORANDUM OF DECISION

PLEASE TAKE NOTICE that the above MEMORANDUM OF DECISION of which the enclosed is a copy, was duly entered in the above entitled action on December 17, 1973.

Dated this 17th day of December, 1973.

CLETUS J. SCHMIDT, CLERK
By: ANNE SYLVESTER
Deputy Clerk.

Before ROSS, Circuit Judge; BENSON, Chief District Judge, DAVIES, Senior District Judge.

(Filed: December 17, 1973)

MEMORANDUM OF DECISION

Benson, Chief Judge.

This is an action brought by Plaintiffs pursuant to 28 U.S.C. §§ 1331(a), 1343(3), (4), 2201, 2202, 2281, 2284, and 42 U.S.C. § 1983, challenging the Constitutional validity of the State of North Dakota obscenity statutes, and certain licensing statutes relating to the licensing of coin operated motion picture machines (amusement devices). Defendant Allen I. Olson, as Attorney General for the State of North Dakota, is responsible for the administration of Chapters 53-04 and 53-06 North Dakota Century Code (NDCC), the licensing statutes under challenge. Defendant John O. Garaas, as State's Attorney for the County of Cass, State of North Dakota, is required by the law to conduct, on behalf of the state, all prosecutions for public offenses in the county which he serves, which would include any violations of licensing statutes, as well as any violations under § 12-21-09 and § 12-21-11 North Dakota Century Code, the obscenity statutes under challenge.[1]

From a stipulation filed by the parties, the Court finds the following facts:

Plaintiffs own and operate a business in the City of Fargo, County of Cass, State of North Dakota, under the

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[1] John O. Garaas, erroneously designated County Attorney in the title of the action has filed his answer in his official capacity as State's Attorney.

name, Adult Book Store. Plaintiff Jerry McCright is the operator and manager of the store. Plaintiff International Amusements, Ltd., is a Delaware Corporation authorized to do business in North Dakota, and is the owner of numerous coin operated amusement devices placed in the bookstore. The devices are machines which exhibit a movie film in a picture box after being activated by a coin.

Some time prior to March 16, 1973, the business site and inventory of the Adult Book Store was acquired by the Plaintiffs from Jemaco Company. Pursuant to Chapter 53-04 NDCC, the Attorney General had licensed the amusement devices to Jemaco Company.

In continuing the operation of the bookstore, Plaintiff, on March 16, 1973, applied to the Attorney General's licensing division for Chapter 53-04 licenses for twenty-five of the amusement devices, and enclosed the appropriate license fee. Prior thereto, on February 20, 1973, and again on February 27, 1973, Defendant John O. Garaas, in his official capacity as State's Attorney of Cass County, instituted criminal proceedings against one James D. Wolfe, then operator of the Adult Book Store owned by International Amusements, Ltd., alleging violation of Section 12-21-09. On March 21, 1973, Cass County law enforcement officials seized several of the amusement devices.

The license applications were received in the Attorney General's office on March 20, 1973. On March 31, 1973, without having issued licenses, and without explanation for not having issued the licenses, agents of the Attorney General's office seized six of the amusement devices.

On April 13, 1973, Plaintiffs commenced an action in this Court, challenging the March 32, 1973, State's Attorney seizure of amusement devices and other inventory. This suit was dismissed on April 25, 1973, pursuant to stipulation, following the return to the Plaintiff of the items seized, with

the exception of one film from the amusement devices, selected by the law enforcement officials. That film was the subject of a § 12-21-09 obscenity prosecution before a jury in County Court, Cass County. A not guilty verdict was returned.

The Plaintiffs continued to operate the amusement devices without licenses, but attached a notice on each indicating application for licenses had been made. On May 3, 1973, an agent of the Attorney General observed the devices in operation without licenses, and on May 9, 1973, the Attorney General's agents, without warrant, prior hearing, or service of notice, seized nineteen of them.

In an effort to discover why the licenses had not been issued, Plaintiffs' attorney telephoned the Attorney General's office. In response to this conversation, Assistant Attorney General Brady, in a letter dated May 22, 1973, set out the reasons why the licenses had not been issued. In substance, the letter related that the license applications could be considered only between the Plaintiffs' dismissal of their federal action on April 25, and the final seizure by the Attorney General on May 3, 1973. At all other times, the subject machines were either confiscated by various enforcement agencies, or were the subject matter of the Plaintiffs' federal suit. Additionally, the letter indicated that confiscation was pursuant to both Chapters 53-04 and 53-06.[2]

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[2] "The reason your client has not received its licenses that were applied for is as follows:

"The application was received on March 20, 1973. On March 21, 1973 the Fargo Police Department seized the devices for which you had applied for licenses. Thereafter six more unlicensed coin-operated amusement devices were confiscated on March 31, 1973 by an agent of this office. On April 13, 1973 you commenced a legal action against this office and others. On April 25, 1973 you dismissed your legal action against this office and others. On May 3, 1973 we were

Along with the letter, the Assistant Attorney General forwarded forms for license applications under Chapter 53-04 and 53-06. On June 4, 1973, the Plaintiff again made

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(Footnote 2 continued)

notified that your client was again operating unlicensed coin-operated amusement devices. On May 9, 1973 twenty-five such devices were confiscated by an agent of this office.

"You will note that the only period of time during which your client's application could be considered was during the period from April 26, 1973 to May 2, 1973, which consisted of approximately five business days. This consideration was further complicated by the fact that of the twenty-five coin-operated amusement devices for which licenses hav e been applied, six of said devices were in the possession of the Attorney General as a result of the confiscation of March 31, 1973. Furthermore, the agent of this office who confiscated the devices stated that nowhere on said devices could be found identification numbers of the nature indicated on your client's application. Without such numbers it is rather difficult to issue a license for a coin-operated amusement device.

"During all other times between the date your application was received by this office and the date of this letter the coin-operated amusement devices you have applied for have either been confiscated and not subject to licensure, or you have instituted a legal action against this office involving the confiscation of certain coin-operated amusement devices, and the issue of confiscation and licensure was presumably before the court.

"Confiscation of the unlicensed coin-operated amusement devices in question was pursuant to the provisions of both Chapter 53-04 and 53-06, North Dakota Century Code, this office having taken the position that the premises where these coin-operated amusement devices are located is a 'moving picture show' with the meaning of Chapter 53-06, North Dakota Century Code."

application for twenty-seven coin operated amusement devices under Chapter 53-04, as well as application for a Chapter 53-06 license. The application included all the machines previously seized and held by the Attorney General.

On June 27, 1973, the Assistant Attorney General, by letter, advised Plaintiffs the licenses would not be issued, because the machines had been operated without license, and for that reason had been confiscated.

James D. Wolfe, former manager of the Adult Book Store, was also prosecuted in Municipal Court, City of Fargo, for alleged violation of the City obscenity statutes, Section 10-0303, Fargo Revised Ordinance of 1965. On August 9, 1973, the Court filed its opinion, holding the City ordinances violated the First and Fourteenth Amendments to the United States Constitution and dismissed the action.[3]

The events as chronicled in the foregoing findings of fact led the Plaintiffs back to federal court, and on August 6, 1973, this action for declaratory relief, injunction, and return of property was filed, together with a 28 U.S.C. § 2281, § 2284 application for a three judge court, which was granted.

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[3] "10-0303. *Buying, selling, and designing obscene literature prohibited.* No person shall (1) buy, sell, distribute or cause to be distributed, or (2) cause to be sold, advertise, lend, give away, offer, show, exhibit, have in his possession with intent to sell, lend, give away, offer, show, exhibit, distribute or cause to be distributed, or (3) design, copy, draw, photograph, print, etch, engrave, cut, carve, make, publish, or otherwise prepare or assist in preparing, or (4) receive subscriptions for any indecent or obscene book, pamphlet, paper, picture, print, drawing, figure, image or any engraved, printed or written matter, or any article or instrument of or for immoral use. No person shall hire, use, or employ any minor to sell, or give away, or in any manner distribute or permit any minor in his custody or control to give away or distribute in any manner any indecent article or thing."

We hold the plaintiffs are entitled to relief.

Chapter 53-04 NDCC requires licenses for the operation of amusement devices. Chapter 53-06 requires the licensing, inter alia, of moving picture shows. Section 12-21-09 prohibits the purchase, exhibition, possession or distribution of obscene material. Section 12-21-11 vests police officers with authority to seize obscene materials.

The Plaintiffs challenge the constitutionality of the state licensing system for amusement devices and movie theaters in general, and as applied. Chapter 53-04, it is urged, sets out no procedural guidelines for its administration or enforcement, and thereby permits seizure by the Attorney General without prior notice or hearing, and permits the Attorney General to act with caprice. Similarly, Chapter 53-06 is claimed to be unconstitutional because, as a whole, it is vague as to the standards for license issuance and denial, and contains no requirements for a hearing or notice prior to seizure. Finally the plaintiffs urge, because their business is the sale of sexually oriented materials, they are continually subjected to criminal prosecution and confiscation, pursuant to NDCC § 12-21-09 and § 12-21-11. The Plaintiffs contend these provisions are so vague and incapable of interpretation, they operate to deny fair notice of the criminal conduct to be proscribed.

The Defendants contend that Chapter 53-04 is regulatory in nature, and as such, vests the Attorney General with complete discretion under the police power to determine the fitness of the applicant. They argue that because the statute is a regulatory act, a hearing prior to seizure is not required.

With respect to Chapter 53-06, the Defendants argue the chapter is sufficiently clear so as to apprise all persons of the included activities. Defendants further argue that the requirements of due process are met by Section 53-06-05,

providing for a hearing instituted by the owner *subsequent* to the seizure.

As for the two Chapter 12-21 provisions, the Defendants argue those sections should first be authoritatively construed by state courts, and until that time, their constitutionality should be presumed. Finally, the Defendants urge that in the situation now before the court, *Younger v. Harris*, 401 U.S. 37 (1971), compels abstention.

I. ABSTENTION

Before considering the constitutional questions raised, the Defendants' abstention argument must be resolved.

This Court concludes the guidelines of *Younger* do not compel abstention in the case before us. In *Younger*, the court was concerned with federal courts of equity interfering in proceedings pending in state courts. There are no state criminal proceedings pending here. *Younger* stressed that as to statutes involved in pending state prosecutions, very special circumstances had to be shown before courts of the United States would enjoin pending state criminal prosecutions. Not only does irreparable injury have to be demonstrated, but that injury must be "both great and immediate". 401 U.S. at 46.

In contrast to the situation in *Younger*, the appellants in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), had been continually harrassed and discouraged from asserting the constitutional rights of Negro citizens. Because of the continuing threats by the state to enforce statutes, the court said the situation was one "in which defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights". 380 U.S. at 485.

Dombrowski does not operate to substantially broaden the availability of injunctions whenever a state statute is found to be vague "on its face". 401 U.S. at 53.

While reaffirming the traditional jurisdictional requirements for injunctions, the *Younger* Court recognized that there may exist such unusual circumstances as to establish the necessary irreparable injury in the absence of bad faith and harassment. The Court did not define what might constitute such an unusual circumstance. The Plaintiffs urge that the statutes here challenged are so incapable of any constitutional construction, that were this court to abstain, it would subject them to prosecution under statutes which are clearly unconstitutional whether construed by state or federal courts.

In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the court held that where no construction or interpretation could serve to render a statute constitutional, a federal court should not abstain, but should proceed to decide the question.

This position was reaffirmed in the case of *Kusper v. Pontikes*, _____ U.S. _____ (Nov. 1973), where the court announced:

> "Where on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States'" (citation omitted).

In the present case, the licensing statutes and the obscenity statutes make no provision for notice or hearing prior to seizure and contain no words which could be interpreted or construed as so providing. Additionally, the obscenity statutes, Sections 12-21-09 and 12-21-11, are on their face so vague as to be incapable of precise meaning.

Thus, the constitutional questions are properly before this Court.

Even though there are no state prosecutions pending as in *Younger*, there does appear to be present the "unusual circumstances" referred to in *Younger*. On the basis of the obscenity statutes, the Defendants have been subjected to continuing prosecutions and harrassment, and on the basis of the licensing statutes, deprivation of property without due process of law. As evidenced by the vague and indefinite explanations in letters from the Attorney General's office to the Plaintiffs, together with the Assistant Attorney General's characterization of the Defendants, in his brief filed with this court, as "not proper subjects to be licensed", there is clearly a great potential of continuing harrassment and prosecution. Additionally, without having to resort to speculation, it is clear from what has transpired, that the statutes in their present form have a chilling effect on the Plaintiffs' First Amendment rights. *See also Lake Carriers Assn v. MacMullan*, 406 U.S. 498 (1972); *Swickler v. Koota*, 389 U.S. 241 (1967); *First American Bank & Trust Company v. Ellwein*, 474 F.2d 933 (9th Cir. 1973); *Literature Inc. v. Quinn*, 484 F.2d 372 (1st Cir. 1973); *Avon 41nd Street Corp. v. Meyerson*, 352 F.Supp. 994 (S.D. N.Y. 1972).[4]

II. THE LICENSING STATUTES

It is helpful to review the legal principles applicable to the consideration of the validity of the North Dakota licensing statutes. It is recognized that the states have a legitimate interest in the regulation of obscene material. *Paris Adult Theater v. Slaton*, ——— U.S. ———, 41 U.S.L.W. 4935, 37 L.Ed.2d 446 (U.S. June 21, 1973); *Stanley v. Georgia*, 394 U.S. 557 (1969). However, this interest must not infringe upon those freedoms of press and speech which are safeguarded by the First and Fourteenth Amendments. Expression by motion pictures is one of those freedoms. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). While

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[4]This case concerned the New York City code governing movie theater licensing.

states may control and regulate obscenity through appropriate statutes, the statutes must be capable of precise meaning in their definition of obscenity. *See Marcus v. Search Warrants*, 367 U.S. 717 (1916), and *Smith v. Calif.*, 361 U.S. 147 (1959). A state's regulatory statutes must conform to procedures that will protect against the deprivation of free expression. Mindful of this threat, the Eighth Circuit in *Luros v. United States*, 389 F.2d 200 (8th Cir. 1968), commented:

> "Many well-intentioned citizens become disgusted or offended with the freedom by which purveyors of trash place their publications in the mail. But within the judicial balance is the basic concern over governmental interference into free expression. It is far better there be a tight rein on authoritarian suppression, (despite differing tasts) than we live in a stifled community of selfcensorship where men must feel apprehension over expression of an unpopular idea . . ." at 206.

Turning to Section 53-04-05, the Attorney General's licensing department is authorized to establish such "rules and regulations as he may deem necessary and expedient". Amusement machines may be confiscated for failure to have a license and the Attorney General may do "any and all acts" necessary to strictly enforce the chapter.

In the case at bar, the "any and all acts" together with the right to refuse a license because the person or place is "improper", as provided in Section 53-06-06, Subsections 1 and 5, have been interpreted so as to allow the Attorney General's department to withhold the licenses without explanation, even though the required license fee had been paid, and then seize the amusement devices without warrant, notice, or prior hearing, because they were not licensed.

Likewise, Section 53-06-04 authorizes inspectors hired by the Attorney General to confiscate all goods of any kind,

nature or description unlawfully exposed, offered or kept for sale, or as a gift, and deliver them to the Attorney General. Judging from the facts of this case, the seizure may be effected without prior hearing to determine the unlawful nature of the goods seized, and without a judicially considered warrant. The Defendant's argument that Section 53-06-05 fulfills the due process requirement by providing for recovery of the confiscated goods through an adversary action instituted by the owner *subsequent* to the actual seizure is not persuasive. The right to sue for recovery of the goods seized does not cure the constitutional deficiency. Without a hearing prior to confiscation, a substantial threat exists that constitutionally protected material would also be seized. A *Quantity of Books v. Kansas,* 378 U.S. 205 (1964). In this posture, the Supreme Court in *Roaden v. Kentucky,* ——— U.S. ———, 41 U.S.L.W. 5071, (U.S. June 25, 1973), stated:

> "Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitous action . . .without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment Standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books *or films,* calls for a higher hurdle in the evaluation of reasonableness" (emphasis added).

Construing Section 53-04-05 and Section 53-06-04 within the context of *Roaden,* we find that both provisions fail to provide those procedural safeguards necessary to the protection of free expression.

We likewise find Section 53-06-06 to be unconstitutional. To permit the Attorney General to prevent

theater operation on the basis of the applicant being an "improper person", or "for any other reason it is an improper place", would be to allow him to arbitrarily exercise his power devoid of ascertainable standards to be applied in a determination of the meaning of "improper".

License refusal or revocation based on such "standards" presents a clear possibility of overbroad application of the statute to activities protected by the First and Fourteenth Amendments. *Soglin v. Kauffman*, 418 F.2d 163 (9th Cir. 1969);[5] *Myerson, supra.*

III. THE OBSCENITY STATUTES

The recent Supreme Court decision of *Miller v. California*, _____ U.S. _____, 41 U.S.L.W. 4925, 37 L.Ed.2d 430 (U.S. June 25, 1973), confined the scope of state statutes designed to regulate obscene materials to works which depict or describe sexual conduct. The conduct proscribed must be specifically defined by the particular statute, as written or authoritatively construed. By this the Court does not mean that all states must enact new obscenity statutes. In a companion case, *Paris Adult Theater I v. Slato n, supra,* the Court said they were not attempting to instruct the states on how to regulate obscene material, but rather were defining the *scope* in which they may regulate obscene material. However, the *Miller* decision is definitive of the area in which states may proceed in dealing with obscene material, and carefully limits it:

> "A state offense must also be limited to works which, taken as a whole, appeal to the purient interest in sex, which portray sexual conduct in a patently

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[5] In this case, the court declared unconstitutional a University of Wisconsin regulation which provided disciplinary action for any student "misconduct".

offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." at 430, 431.

Where the statute specifically defines the conduct which is prohibited, a trier of fact would have a clear standard by which to judge whether any given subject matter is obscene. As expressed in *Miller*:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the purient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (citations omitted).

NDCC § 12-21-09 does not meet the requirements which *Miller* has set out for state statutes. It is overly broad and so ambiguous that it fails to provide adequate, fair notice of the criminal conduct to be regulated. Words such as "salacious", "lascivious", "obscene", "lewd" and "indecent" are so void of common meaning when applied to a particular act or work that a person would have no way of determining whether his conduct or material violates the statute.

In addition to being vague, Section 12-21-09 is also unconstitutional in its failure to provide for scienter. In *Smith v. California*, 361 U.S. 147 (1953), the Court made it clear that a person cannot be made criminally liable without knowledge of the contents of what he is selling:

"By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on

the public's access to constitutionally protected matter." at 153.

Section 12-21-11 has some of the same deficiencies as 53-04-05 and 53-06-04 in that it permits seizure of property by a peace officer without the requirement of a detailed search warrant or prior hearing. It leaves the initial determination of what is obscene up to the confiscating officer. It is conceivable that within this dragnet would be caught up materials protected by the First and Fourteenth Amendments. Accordingly, this section violates the constitutional guarantee of the First, Fourth and Fourteenth Amendments as enunciated in *Roaden.*

For the reasons set out in this opinion, we hold that NDCC §§ 12-21-09, 12-21-11, 53-04-05, 53-06-04, and Subsections 1 and 5 of § 53-06-06 are unconstitutional.

We do not hold that a state or city cannot validly regulate and license theaters and amusement devices, and we have not held that obscenity cannot be regulated. Theaters, amusement devices and obscenity may be regulated under the police power on the basis of public health, welfare and safety by means of a narrowly drawn statute or ordinance. Such statutes or ordinances must, as enunciated by the Supreme Court of the United States, specifically define prohibited conduct and material and must provide procedural safeguards if the seizure of property is to be permitted.[6]

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[6] In an unreported decision, the Municipal Judge of the City of Fargo, North Dakota, in finding the city obscenity ordinance violative of the Miller guidelines said, "This decision . . . is not a victory for the defendants nor a defeat for the City. It is a reminder that this is 1973, and that a new sound law is required to enable prosecutors and lawmen alike to do their jobs well, and to put the citizenry on notice as to what is, and what is not, lawful in respect of pornography and obscenity." August 9, 1973.

The Plaintiffs are entitled to have their amusement devices licensed, and they are entitled to have the devices which have been seized returned to them. It is assumed this will be done without the necessity of the Court granting the injunctive relief requested. The Court will grant injunctive relief if, upon application, it is shown that it is necessary to carry out the mandate of this decision.

IT IS ORDERED that judgment be entered accordingly.

Dated this 17 day of December, 1973.

/s/ DONALD R. ROSS
UNITED STATES CIRCUIT JUDGE

/s/ PAUL BENSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

/s/ RONALD N. DAVIES, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX

North Dakota Century Code

Chapter 53-04

§ 53-04-05. **Administering and enforcing provisions of chapter – Confiscation of machines and devices.** – The attorney general's licensing department shall administer and enforce the provisions of this chapter, and for that purpose the attorney general is directed and authorized to make, promulgate, and enforce such reasonable rules and regulations as he may deem necessary and expedient. The attorney general and the inspectors of such department may confiscate all machines and devices as defined in this chapter upon which the license fee required as provided in section 53-04-04

has not been paid, and may do any and all acts necessary or expedient for the strict enforcement of the provisions of this chapter.

Chapter 53-06

§ 53-06-04. Authority of inspectors to seize and confiscate property unlawfully used or employed. – Whenever any inspector shall find in the possession of any person, firm or corporation doing business within this state:

1. Goods, wares, or merchandise of any kind, nature, or description unlawfully exposed, offered, or kept for sale or as a gift; or

2. Any device of any kind, nature, or description, used as a game of chance or for gambling purposes, such inspector is hereby authorized and empowered, whether the violator is arrested or not, to seize, confiscate, and deliver to the attorney general of the state all such goods, wares, and merchandise, games of chance, or gambling devices, together with the contents thereof.

§ 53-06-06. Refusal or revocation of license – Procedure. – The attorney general may refuse to issue a license to any person for any place where it appears:

1. That the applicant is an improper person to be licensed;

2. That the place is not provided properly with sanitary equipment;

3. That the building is not suitable for the protection of the life and limbs of the public who may frequent the same;

4. That there are not suitable appliances for the protection of the public in case of fire; or

5. That for any other reason it is an improper place to be licensed.

The attorney general, after a hearing before him upon any violation by a license of any statute of this state, is authorized to revoke any license granted pursuant to the provisions of this chapter. After the licensee has pleaded guilty to, or has been convicted of, a violation of any law or ordinance of any city regulating the business licensed a second time, his license shall be revoked and for one year neither he nor any place in which he may have any financial interest may be licensed again.

Chapter 12-21

§ 12-21-09. **Buying, selling, distributing, exhibiting, preparing, possession of, or bringing into state any equipment for preparing lewd and obscene matter – Distribution of indecent articles – Tie-in sales.** – No person, firm, copartnership, or corporation shall buy, sell, cause to be sold, advertised, lend, give away, offer, show, exhibit, distribute, cause to be distributed, or design, copy, draw, photograph, print, etch, engrave, cut, carve, make, publish, prepare, assist in preparing, solicit or receive subscriptions for, or hold in possession with intent to sell, lend, give away, offer, show, exhibit, distribute, or cause to be distributed, or bring or cause to be brought into the state any obscene, lewd, salacious, or lascivious book, pamphlet, picture, paper, letter, magazine, newspaper, writing, print, printing, film, negative, transcription, wire or tape recording, cast, cut, carving, figure, image, or other matter, article or instrument of indecent character or immoral use, or any equipment, machinery, or devices used or intended to be used in the preparation, manufacturing, or producing of such obscene matter and material. The trial court shall take into consideration and give due weight to the approval by the national association known as the "Comics Code Authority", or such association's successors, of any comic books or publications in question under sections 12-21-07, 12-21-09, and 12-21-11.

No person, firm, copartnership, or corporation shall as a condition to a sale or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, book, or other publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, or disgusting.

The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene, lewd, salacious, or lascivious matter shall not apply to a motion picture projectionist acting within the scope of his employment as an employee of any person, firm or corporation exhibiting motion pictures pursuant to a license issued under the provisions of chapter 53-06, provided that such operator has no financial interest in his place of employment, other than wages.

§ 12-21-11. **Seizure and confiscation of equipment used in production or manufacture of indecent literature or articles and of vehicles used in distribution of indecent articles authorized.** – Any peace officer of this state may seize any equipment used in the printing, production, or manufacture of indecent and obscene literature, matter, or articles of whatever nature, and may seize any vehicle or other means of transportation used in the distribution of such indecent and obscene literature, matter, or articles, and may arrest any person in charge thereof, provided that such arrest shall not be made of a motion picture projectionist acting within the scope of his employment as an employee of any person, firm, or corporation exhibiting motion pictures pursuant to a license issued under the provisions of chapter 53-06, provided that such operator has no financial interest in his place of employment, other than wages. The procedures prescribed in chapter 29-31 of this code relating to confiscation of equipment used in commission of crimes shall apply and shall be followed in carrying out the provisions of this section.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,
Respondent,
Louis Watkins,
Appellant.
Appeal From Darlington County
J.A. Spruill, Jr., Judge
Opinion No. 19727
Filed November 26, 1973

REAFFIRMED

George S. Daly, Jr., of Charlotte, N. C.; and Laughlin McDonald, of Atlanta, Georgia, for appellant.

Attorney General Daniel R. McLeod and Assistant Attorney General John P. Wilson, both of Columbia; Solicitor Marion H. Kinon, of Dillon; and Paul A. Sansbury, of Darlington, for respondent.

LITTLEJOHN, A. J.: This case has been before this Court heretofore, resulting in our opinion affirming a conviction in State v. Watkins, 259 S. C. 185, 191 S. E. (2d) 135 (1972). Thereafter, Watkins appealed to the Supreme Court of the United States. It was among more than 50 cases involving the Law of Obscenity. The United States Supreme Court disposed of the appeal by ordering "that the judgment of the Supreme Court of South Carolina in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of South Carolina for further consideration in light of Miller v. California, _____ U.S. _____, 93 S. Ct. 2607, 37 L. Ed. (2d) 419 (1973); Paris Adult Theatre I v. Slaton, _____ U.S. _____, 93 S. Ct. 2680, 37 L. Ed. (2d) 392 (1973); U.S. v. 12 200-ft. Reels of Super 8mm Film,

_____ U.S. _____, 93 S. Ct. 2665, 37 L. Ed. (2d) 500 (1973); U.S. v. Orito, _____ U.S. _____, 93 S. Ct. 2674, 37 L. Ed. (2d) 513 (1973); Heller v. N. Y., _____ U.S. _____, 93 S. Ct. 2789, 37 L. Ed. (2d) 745 (1973); Roaden v. Ky., _____ U.S. _____, 93 S. Ct. 2796, 37 L. Ed. (2d) 757 (1973); and Alexander v. Virginia, _____ U.S. _____, 93 S. Ct. 2803, 37 L. Ed. (2d) 993 (1973)," (Citations Added)

We now proceed to dispose of the case, keeping in mind Miller, Paris Adult Theatre, and other opinions cited by the United States Supreme Court. The Court has consistently held both before and in Miller and in Paris Adult Theatre that obscenity is not protected by the First Amendment to the Constitution of The United States.

In Miller there was involved a statute of the California Legislature which defined obscenity as follows:

> " 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

In Paris Adult Theatre there was involved a statute of the Georgia Legislature which defined obscenity as follows:

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of . . illegible . . . matters. . . . "

In the case before us there is involved a statute of the South Carolina Legislature which defines obscenity as follows:

> " 'Obscene' means that to the average person applying contemporary standards, the predominant appeal of the matter taken as a whole, is to prurient interest among which is a shameful or morbid interest in nudity, sex, or excretion, and which goes substantially beyond customary limits of cander in description or representation of such matters. . . . "

It is readily observed that the statutes of the three states undertaking to define obscenity are amazingly similar.[1] It is obvious that the legislatures in all three states strove to enact a law compatible with the ruling in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. (2d) 1498 (1957). The principal difference between the South Carolina statute on the one hand and the California and Georgia statutes on the other hand lies in the omission of utterly without redeeming social value (or importance) in our statute.

Such omission from the South Carolina statute is without real meaning, and we think that the three statutes have the same constitutional footing. No constitutionally valid argument can be made that one of the three should stand and another fall. In Miller the majority opinion of Chief Justice Burger said:

> "We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of Memoirs (sic) v. Massachusetts, supra, 383 U.S., at 419 (1966); that concept has never commanded the adherence of more than three Justices at one time."

---

[1] New York and Kentucky also have similar statutes.

Notwithstanding the fact that our statute did not require that material be "utterly without redeeming social value" to warrant a conviction, the trial judge charged the jury that before a conviction could be had it must find "that the material is utterly without redeeming social value." Watkins was given the benefit of this charge and should not be heard to complain. The charge was more favorable to Watkins than a charge required by Miller to the effect that in order to warrant a conviction a jury must find that the work, taken as a whole, lacks serious material, artistic, political, or scientific value.

The absence of Miller specificity did not render the Georgia statute and the California statute unenforceable or unconstitutional. By a similar token, our statute is not unenforceable or unconstitutional. It is significant that the statutes of California and of Georgia were not invalidated, and the judgments were vacated but not reversed. In Paris Adult Theatre the Court said:

> "In this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theatres from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene materials exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in Miller v. California, supra, _____ U.S. _____, at _____ (pp. 9-11)."

We quote the First Amendment standards from Miller as follows:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying

contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, quoting Roth v. United States, supra, 354 U.S., at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value test of Memoirs (illegible) v. Massachusettes, supra, 383 U.S., at 419 (1966)."

We are of the opinion that the proof required of the State under our statute is more strict than the proof required by the Miller standards. The State has met Roth requirements. Until our statute is amended by the legislature, the more strict requirements of the law of this State must be met before a conviction can be had. Even as the legislature strove to adapt its obscenity definition to the guidelines of Roth, supra, it may now need to adapt a new definities to Miller. In the meantime, we cannot say that the legislature brought into being an unconstitutional statute by following the Roth guidelines.

To say that statutes which followed the Roth guidelines so closely are unconstitutional, is to say that no statute could be enacted compatible with Roth. To hold that the statute is too broad and vague is to hold that the opinions of the United States Supreme Court which gave birth to the statute are too broad and vague. Obviously, the test of Roth is different from the test of Miller. Watkins is charged with an offense after Roth and before Miller. The trial judge utilized the test which prevailed under the applicable statute as amplified by authoritative construction published at the time of the offense. Such statute and authoritative construction constituted notice of the proscribed conduct. The trial judge

was not expected to anticipate the holding in Miller and conducted the trial under the applicable law.

We do not regard Miller as having overruled Roth, at least not so as to require retroactive application. Rather, we regard it as an attempt to clarify what shall henceforth constitute the standards applicable to obscenity. We can further say that we interpret the Miller test as less exacting upon the State than is the Roth test, such that material determined to be obscene under Roth is, a fortiori, obscene under Miller.

The law as charged by the trial judge to the jury which convicted Watkins required the State to meet the most rigorous obscenity proof ever enunciated by the United States Supreme Court. Watkins was tried under Roth. The equities have been balanced and hereafter applicable law under Miller will be less favorable to a defendant and more favorable to the State.

We regard the United States Supreme Court's disposition of Watkins' appeal not as requiring this Court to apply the Miller test to this defendant's case, but rather as allowing this Court opportunity to determine whether or not the present South Carolina obscenity statute squares with those henceforth applicable standards.

Miller puts to rest the contention that material must be "utterly without redeeming social value" and the argument that the community standard is a national one.

We construe § 16-414.1 of the Code of Laws of South Carolina (1962, as amended) to apply to hard core sexual conduct, such as patently offensive representations of ultimate sexual acts, normal or perverted, actual or simulated; and such as patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

The conviction and sentence of Watkins is

REAFFIRMED

MOSS, C. J., LEWIS, BUSSEY and BRAILSFORD, JJ., concur.

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Supreme Court, U. S.
FILED
JAN 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1161

PARIS ADULT THEATRE, I,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE, II,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

APPENDIX – VOLUME II

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Respondents.

APPENDIX – VOLUME II

IN SUPREME COURT OF WISCONSIN

State No. 179
August Term, 1973

State of Wisconsin ex rel. JOSEPH CHOBOT,
Petitioner,
v.
CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE HERBERT J. STEFFES,
CIRCUIT JUDGE, Presiding,
Respondent.

(Filed December 10, 1973)

ORIGINAL ACTION for a writ of prohibition to restrain the Honorable Herbert J. Steffes, Circuit Judge of the 2nd Judicial Circuit, Branch No. 11, for Milwaukee County. *Writ denied.*

This is an original action for a writ of prohibition to restrain the respondent Herbert J. Steffes, Circuit Judge, from proceeding with the trial of the petitioner Joseph Chobot on a charge of selling obscene pictures. On May 26, 1972, Chobot, the operator of Century Book Store in Milwaukee, sold a magazine entitled "Response" for $5 to a police officer, for which he was charged with a violation of sec. 944.21 (1) (a), Stats. A motion was filed to dismiss the case on the ground the section was unconstitutionally vague. This motion and a similar renewal motion were denied by the respondent and the case was set for trial on August 6, 1973. A petition for a writ of prohibition was then filed with this court on August 2, 1973. In view of *Miller v. California* (1973), 000 U.S. 000, 93 Sup. Ct. 2607, 37 L. Ed. 2d 419, decided June 21, 1973, this court, after hearing oral arguments, elected to treat the petition as one for leave to commence an original action and ordered the proceedings in the trial court stayed.

HALLOWS, C. J. Chobot contends: (1) That sec. 944.21 (1) (a), Stats., is unconstitutionally vague under *Miller v. California* and companion cases[1] as written and as heretofore construed by this court; (2) that to meet the standards of definiteness, this court may not reconstrue the section so that it contains the test of obscenity formulated in *Miller*; and (3) even if this court reconstrues the section, such construction cannot be retroactively applied to his prior acts.

There is no definition of "obscenity" in sec. 944.21 (1) (a), Stats., which provides:

> "Lewd, obscene or indecent matter, pictures and performances.
>
> (1) Whoever intentionally does any of the following may be fined not more than $5,000 or imprisoned not more than 5 years or both:
>
> (a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film;"

As written, this section on its face is vague under the test laid down by *Miller*, which requires a definition of obscenity either expressly written in the statute or furnished by interpretation. In a homogenized society, it might be assumed

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[1] See *Paris Adult Theater I v. Slaton* (1973), 000 U. S. 000, 93 Sup. Ct. 2628, 37 L. Ed. 2d 446; *Kaplan v. California* (1973), 000 U. S. 000, 93 Sup. Ct. 2680, 37 L. Ed. 2d 492; *Alexander v. Virginia* (1973), 000 U. S. 000, 93 Sup. Ct. 2803, 37 L. Ed. 2d 993; *Heller v. New York* (1973), 000 U. S. 000, 93 Sup. Ct. 2789, 37 L. Ed. 2d 745; *Roaden v. Kentucky* (1973), 000 U. S. 000, 93 Sup. Ct. 2796, 37 L. Ed. 2d 757; *United States v. Orito* (1973), 000 U. S. 000, 93 Sup. Ct. 2674, 37 L. Ed. 2d 513; *United States v. Twelve 200-Foot Reels of Super 8MM Film* (1973), 000 U. S. 000, 93 Sup. Ct. 2665, 37 L. Ed. 2d 500.

everyone understands what obscenity means, at least for a reasonable period of time; but in our pluralistic society with varying, changing standards of conduct, the word "obscenity" has come to mean many different things to different people. Being a criminal statute, sec. 944.21 (1) (a) must give fair notice of what is prohibited and so, the latest pronouncement in the fluctuating definition of obscenity by the United States Supreme Court now requires the term "obscenity" to be defined and limited in its terms to sexual conduct.

Textual or pictorial obscenity is related to the freedom of speech guaranteed by the First Amendment to the United States Constitution; and while it has been said the obscenity is not protected by the First Amendment to the constitution, this statement must be understood to include only obscenity defined in constitutional terms. Obscenity in a layman's sense may not be obscenity in a constitutional sense; and even what might be considered as flagrant obscenity in a layman's sense may be given constitutional protection.

Miller, in modifying previous rules to determine obscenity, recognizes the permissible extent to which a state may regulate expression of obscenity in a constitutional sense. The court states at p. 2614:

> "We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

The guidelines to the definition of "obscenity" are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . ., (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic ,political or scientific value." *Miller v. California, supra,* 2615.

Thus the states are restricted to regulating works which depict or describe sexual conduct, which must be defined either in the statute or in its authoritative judicial construction; and the sexual conduct so defined must be portrayed in a patently offensive manner; and the work, so portraying sexual conduct, taken as a whole, must appeal to the prurient interest in sex of the average person judged by contemporary community standards and have no serious literary, artistic, political or scientific value. All other expression or portrayal of undefined sexual conduct apparently is protected by the First Amendment to the constitution.

What appeals to "prurient interest in sex" must be judged by community standards. What amounts to "patently offensive" in the manner of description is not expressly defined in *Miller,* but it is reasonable to read this term, too, as being determined by contemporary community standards (*see* our comment, p. 149, in *McCauley v. Tropic of Cancer* (1963), 20 Wis. 2d 134, 121 N.W. 2d 545). There is no vagueness in the commonly-accepted meaning of the terms "literary, artistic, political or scientific value" and these are qualified by the adjective "serious" which means important and not trifling.

Miller has not made as many modifications of the *Roth-Memoirs* test, at least in the Wisconsin construction of

its statute, as one at first blush might think. Prior to the decision in *Miller*, the prevailing test of obscenity was that articulated in *Memoirs v. Massachusetts* (1966), 383 U.S. 413, 86 Sup. Ct. 975, 16 L.Ed.2d 1, which itself merely refined the test of *Roth v. United States* (1967), 354 U.S. 476, 77 Sup. Ct. 1304, 1 L.Ed.2d 1498. In *Memoirs*, the court stated at p. 418 that under the *Roth* test:

> "... as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Chobot argues that at least three major changes were made by *Miller* in the *Roth-Memoirs* test: (1) That the statute as written or construed must specifically define sexual conduct; (2) community standards means state as opposed to national standards; and (3) the requirement that the material be "utterly without redeeming social value" has been replaced by the more definite concept that the material have "serious literary, artistic, political or scientific value."

This court in its prior construction sec. 944.21 (1) (a), Stats., has adopted the *Roth-Memoirs* formulation of constitutional obscenity with some modifications. In *State v. Chobot* (1960), 12 Wis. 2d 110, 106 N.W. 2d 430, this court adopted the *Roth* test of obscenity and sustained the trial court's finding that certain magazines were, in fact, obscene. In so construing sec. 944.21 (1) (a), the court held the words "lewd, obscene or indecent" were not constitutionally vague and indefinite. In *Tropic of Cancer* (1963), 20 Wis. 2d 134, 121 N.W. 2d 545, the court again applied the *Roth* test of obscenity although this time in a civil action for a declaratory judgment involving sec. 269.565, Stats. The trial court had

declared *Tropic of Cancer* to be obscene; after an independent review of the book, this court reversed but upheld sec. 269.565 against the challenge that it was unconstitutional for vagueness. In reversing, this court concluded the trial court had given insufficient consideration to the fact that the book had "commanded serious attention as a literary work of some importance" and stated, p. 143: "Where a work of apparent serious purpose is involved, the scales will not readily be tipped toward the determination of obscenity."

In 1966 the United States Supreme Court decided *Memoirs v. Massachusetts, supra,* and in a plurality opinion the *Roth* test was redefined and elaborated upon. This court thereafter modified its construction of sec. 944.21 (1) (a), Stats., to reflect the *Memoirs* formulation. In *State v. Veshart* (1968), 39 Wis. 2d 419, 159 N.W. 2d 1, the question of obscenity arose in the context of a challenge to the contraband statute, sec. 963.04(5), and this court held the words "lewd, obscene or indecent" in that section "must be interpreted in the constitutional sense, as including only printed or filmed material that are not protected by the First Amendment to the United States Constitution as interpreted by the United States Supreme Court." The *Roth-Memoirs* test and the hard-core pornography test were both discussed and the material found obscene under both of them.

In *State v. Amato* (1971), 49 Wis. 2d 638, 183 N.W. 2d 29, the court sustained a conviction under sec. 944.21 (1) (a), Stats., for the sale of obscene material, relying on an independent review of the magazines involved and upon the *Roth-Memoirs* test. The court also considered whether the *Roth-Memoirs* test had been modified by *Ginzburg v. United States* (1966), 383 U.S. 463, 86 Sup. Ct. 942, 16 L. Ed. 2d 31, or *Redrup v. New York* (1967), 386 U.S. 767, 87 Sup. Ct. 1414, 18 L.Ed. 2d 515. We recognized that *Ginzburg* added a theory that evidence of pandering and the method of the description was relevant to the determination of the dominant purpose of the material and that *Redrup* did not

foreclose a finding of obscenity even though the allegedly obscene material was not pandered or sold to minors or so obtrusively displayed as to cause unwilling viewers to see it. *Miller* has not affected these decisions.

In *State v. Kois* (1971), 51 Wis. 2d 668, 188 N.W. 2d 467,* we stated that whether this court was required to or not it had accepted the *Roth* test as modified by *Memoirs.* In that case the court affirmed the trial court's finding that an issue of Kaleidoscope, a newspaper, was obscene. We also recognized that the test of obscenity for constitutional purposes was in a state of flux and the court had followed what had appeared to be from time to time the majority or the plurality view of the Supreme Court of the United States. The cases since *Kois* have referred to and followed the *Roth-Memoirs* test.[2]

However, not all of the steps constituting the procedure for determining obscenity were followed. In *Court v. State* (1971), 51 Wis. 2d 683, 188 N.W. 2d 475, 000 U.S. 000, 93 Sup. Ct. 3032, 37 L.Ed. 2d 1023,[3] we abandoned an independent review on appeal and fashioned a new test for

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* rev'd sub nom.,Kois v. Wisconsin (1972), 408 U.S. 229, 92 Sup. Ct. 2245, 33 L. Ed. 2d 312.

[2] *Court v. State* (1971), 51 Wis. 2d 683, 188 N.W. 2d 475; *State v. I, A Woman-Part II* (1971), 53 Wis. 2d 102, 191 N.W. 2d 897; *Orito v. State* (1972), 55 Wis. 2d 161, 197 N.W. 2d 763; *State v. Simpson* (1972), 56 Wis. 2d 27, 201 N.W. 2d 558; *State v. Bruesewitz* (1973), 57 Wis. 2d 475, 204 N.W. 2d 514.

[3] We have considered the remand of *Court v. State, supra,* and have ordered counsel to submit their respective views on what this court's position should be in the light of *Miller* on (1) the scope of independent review and (2) the geographical area of community standards.

scope of review in obscenity cases, concluding, p. 698, that "...the free-speech interest will be protected by the courts of this state when juries are strictly enjoined to follow the constitutional standards of *Roth* in making the initial determination of obscenity and when such findings are sustained on an appeal only when there is substantial evidence, in view of the record as a whole to reach that conclusion."

However, an independent review is required in *Miller* (p. 1615):

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

The majority of the court believes that the scope of the independent review is not at issue here and would not reach the question of the scope of the independent review. The court, therefore, reserves the question.

Miller rejected "contemporary community standards" on a national scale as unworkable. This court has never accepted a national community standard. *State v. Kois, supra; McCauley v. Tropic of Cancer, supra.* The majority of the court does not reach the question of what constitutes community standards and, therefore, reserves the question.

In *Paris Adult Theatre I v. State, supra,* the United States Supreme Court held that it was not error to fail to require expert evidence that certain materials are obscene when the materials themselves are placed in evidence. Prior to these decisions, this court expressly held in *Amato, in* Court,

and in *I, A Woman* that it was not error to reject expert evidence that certain material was obscene according to community standards when the material itself was placed in evidence.[6]

Chobot claims *Miller* changed the standard which required the obscene material to be "utterly without any redeeming social value" to require that the material lack "serious artistic, political or scientific value." The "utterly without" part of the *Roth-Memoirs* test was never strictly followed by this court. As pointed out in the concurring opinion in *Voshart*, this test was a misapplication of the language in the original *Roth* decision and the word "utterly" added nothing to the word "without". In *Court*, the court took the view that the value which might save obscene material and cloak it with a constitutional protection must be social and must be redeeming and such words "carry the implicit connotation of a fact-finder's value judgment. They are words which suggest a balancing of interest." This view was reiterated in *State v. I, A Woman-Part II, supra*, at pp. 118, 119, in which it was stated:

> "Nor do we believe that the value that will redeem a prurient piece that affronts contemporary community standards is a miniscule value, a mere scintilla of social value, an 'iota,' or infinitesimal value. If the material is objectionable on the first two

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[6] *Paris Adult Theater* cited *State v. Amato, supra, cert. denied sub nom. Amato v. Wisconsin* (1972), 404 U.S. 1063, 92 Sup. Ct. 735, 30 L. Ed. 2d 751. While the supreme court expressly reserved judgment in *Paris Adult Theater* on the question of whether the trier of fact is capable without expert testimony of determining the prurient appeal of material directed at a bizarre deviant group (a problem posed by *Mishkin v. New York* (1966), 383 U.S. 502, 86 Sup. Ct. 958, 16 L. Ed. 2d 56), this reservation is no longer relevant under *Miller* because the test is the average man.

> Roth-Memoirs standards, it will be redeemed only by a social value that is discernible to a reasonable finder of fact, is demonstrable, and not conjectural. It should pervade the material, and cannot appear as noble platitudes with a social message unrelated to the uniform tenor of the material. The third standard of the *Roth-Memoirs* test presupposes that the qualities that purport to save the material as evincing redeeming social value are not mere makeweight contributed to avoid the operation of the rule."

In *McCauley v. Tropic of Cancer, supra,* this court took the view that a literary work had to have a "serious purpose" and we stated: "We are of the opinion that where a work of apparent serious purpose is involved, the scale will not readily be tipped toward a determination of obscenity." Thus this court in its construction of the *Roth* test required a serious purpose to constitute social value. So far as Wisconsin is concerned, all *Miller* has done is to limit the concept of "social value" to a more restrictive literary, artistic, political or scientific sense; all of which are of social value. Consequently, *Miller* made no substantial change in this respect in the Wisconsin interpretation.

The only deficiency in sec. 944.21 (1) (a), Stats., is that it does not contain an express definition of obscenity in terms of sexual conduct and our previous opinions have not expressly so limited obscenity. The question is whether this court can now save the section by interpretation and supply a constitutional definition of obscenity. It is argued by Chobot

that this court cannot because its previous interpretations have become a part of the statute under the doctrine "A decision construing a statute becomes an integral part of the statute itself."[7] This doctrine, frequently followed by the court, has also been honored in its breach. There have been times when this court has changed its construction of a statute without referring to the doctrine. The doctrine is not all-embracing and it may well apply only to the construction of words which have a static meaning and are so used. However, words which carry constitutional implications stand on a different footing, and when a word, such as obscenity, is used without an expressed definition in the statute, the legislature must intend the courts to furnish its meaning from time to time as the constitutional concept of that word varies. The constitution is a living document and words in statutes dependent upon the constitution must be no less elastic. Under this theory, this court interpreted "obscenity" first in terms of *Roth* and then modified its interpretation in terms of *Memoirs*. *See, e.g., State v. Voshart, supra,* and *State v. Kois, supra.* If the alleged doctrine of statutory interpretation were strictly applied, this court could not have adopted *Memoirs'* modification. It may be that the doctrine prevents a complete reversal of interpretation, but we do not reach that issue because here we make only a refinement or modification of meaning to keep the statute from being unconstitutional.

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[7] *Milwaukee County v. City of Milwaukee* (1933), 210 Wis. 336, 246 N.W. 447; *Thomas v. Industrial Commission* (1943), 243 Wis. 231, 10 N.W. 2d 206; *Zimmerman v. Wisconsin Electric Power Co.* (1968), 38 Wis. 2d 626, 157 N.W. 2d 648. In *Zimmermann,* this doctrine was explained as resting on the principle that once the court has perceived and enunciated the unchanging historical fact of legislative intent, legislative acquiescene in the court's interpretation amounts to acknowledgment that the court was correct. Since legislative intent is a historical concept, once discerned and acquiesced in, it cannot later be said to be something else.

Besides, this court has the duty to uphold the statute if it can and in the past has supplied deficiencies to save a statute. *See Huebner v. State* (1967), 33 Wis. 2d 505, 147 N.W. 2d 646, where this court granted a judicial hearing in sex deviate cases not provided for by the statute in order to save the statute.

We recognize there is a split of authority in other states on this point. The Supreme Court of Indiana has held its obscenity statute unconstitutional for lack of definition. *Stroud v. State* (August, 1973), 13 Crim Law Reports 2541. On the other hand, in *State* of *Washington v. J-R Distributors, Inc.* (July, 1973), 14 Crim. L. Reports 2206, the washington Supreme Court upheld its state statute prohibiting the sale of obscene material by affording the term "obscenity" an "authoritative judicial construction" pursuant to its understanding of the mandate of *Miller.* In *United States v. Thevis* (September, 1973) 14 Crim. L. Reports 2026, the Fifth Circuit Court of Appeals took the position that the specific descriptions of sexual conduct demanded of a statute by *Miller* can be supplied by authoritative judicial construction. That is precisely what the United States Supreme Court did itself in *Twelve 200-Foot Reels of Super 8 MM. Film* (1973), 000 U.S. 000, n. 7, 93 Sup. Ct. 2665, 2670, n. 7, 37 L.Ed. 2d 500. The Ohio Supreme Court in Keating v. "Vixen" (Sept. 26, 1973), 14 Crim. L. Reports 2041, has construed its obscenity statute to comport with the standards enunciated in *Miller. See also People v. Enskat* (August, 1973), Calif. Court of Appeals, Second Appellate Distr., 13 Crim. L. Reports 2522; and *Rhodes v. Florida* (Fla. Sup. Ct., Sept. 1973) Case No. 41-416.

Additional support for the proposition that this court may now construe the statute to comport with the *Miller* formulation of obscenity may be found in *Miller* itself, p. 2615, n. 6:

> "We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore, or *hereafter*, may well be adequate. *See United States v. 12-200 Ft. Reels Film*, _____U.S._____, p._____, n. 7, 93 S. Ct. 2665, p. 2670, n. 7 36 L. Ed. 2d _____ (1973)."

Consequently, *Miller* did not reverse the lower court but "vacated and remanded for further proceedings." The court directed the remand court to conduct further proceedings in a manner "not inconsistent with the First Amendment standards established by this opinion." *Miller* at 2622. In *Paris Adult Theater*, a companion case to *Miller*, the court stated:

> "In light of these holdings, nothing precludes the state of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia Law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California* . . ."

Again, the United States Supreme Court's mandate reads "Vacated and remanded for further proceedings." This mandate appears in all the *Miller* companion cases. Significantly, at the conclusion of each opinion, where the remand court is directed to conduct further proceedings not inconsistent with the First Amendment standards established by *Miller*, the Supreme Court cites *United States v. 12-200 Ft. Reels* (1973), – U.S. – p. _____, n. 7, 93 Sup. Ct. 2665, 2670, n. 7, 36 L. Ed. 2d 500. This footnote reads:

> " We further note that, while we must leave to state courts the construction of state legislation, we do not have a duty to authoritatively construe federal statutes . . . If and when a 'serious doubt' is raised as to the vagueness of the word 'obscene,' 'lewd,' 'lasciuious,' 'filthy,' 'indecent', or 'immoral,' as used to describe regulated material in 19 U.S.C. sec. 1305 (a) and 18 U.S.C. sec. 1462 . . .we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller v. California, supra,* 2615-2616 . . .Of course, Congress could always define other specific 'hard-core' conduct."

Thus it appears the United States Supreme Court has in effect construed the federal statute and has invited state appellate courts to construe their obscenity statutes to comport with the *Miller* standards.

We conclude this court has the power and the duty to define "obscenity" in terms of minimum standards to save the statute. If the legislature of Wisconsin desires to modify or add to such definition, it certainly has the power to do so. We, therefore, construe the word "obscene" in sec. 94421 (1) (a), Stats., to mean works which depict or describe sexual conduct, and (1) which taken as a whole appeal to the prurient interest in sex, (2) which taken as a whole portray sexual conduct in a patently offensive way and (3) which taken as a whole do not have serious literary, artistic, political or scientific value. Whether a work appeals to the prurient interest and whether it depicts or describes sexual conduct in a patently offensive way and whether it has serious literary, artistic, political or scientific value are to be determined by its effect upon the average person applying contemporary community standards. Sexual conduct is defined to be acts of sexual intercourse between humans, normal or perverted,

actual or simulated, acts of masturbation, fellatio, cunnilingus, and acts of excretory function, lewd exhibition of the genitals especially is a stimulated condition and sexual relations between humans and animals. As thus authoritatively construed, sec. 944.21 (1) (a) meets the test postulated by *Miller*.

The last argument of Chobot is that this court's construction of sec. 944.21 (1) (a), Stats., to comport with *Miller* cannot apply to him because he had no fair warning of such construction.

Chobot cites *Bouie v. Columbia* (1963), 378 U.S. 347, 84 Sup. Ct. 1697, 12 L.Ed. 2d 894, for the proposition that the construction may not apply. Justice Douglas cited this case for the same proposition in his dissent in *Miller* (p. 2624). However, since the mandates in *Miller, Paris Adult Theatre I, Twelve 200-Foot Reels,* and *Orito,* and companion cases, did not reverse but only vacated and remanded the cases for further proceedings not inconsistent with *Miller,* it would appear the supreme court intended its latest expression of the standards to be applied to offenses committed prior to its announcement in *Miller.* The supreme court has long recognized that once a limiting construction of a criminal statute is rendered which is sufficient to rehabilitate the potential vagueness of the statute, such construction may be applied to punish conduct occurring prior to the construction. *Dombrowski v. Pfister* (1965), 380 U.S. 479, n. 7, 85 Sup. Ct. 1116, 14 L. Ed. 2d 22; *Poulos v. New Hampshire* (1953), 345 U.S. 395, 73 Sup. Ct. 760, 97 L.Ed. 1105; *Cox v. New Hampshire* (1941), 312 U.S. 569, 61 Sup. Ct. 362, 85 L.Ed. 1949; *Winters v. New York* (1948), 333 U.S. 507, 68 Sup. Ct. 665, 92 L.Ed. 840. This doctrine, however, is subject to the limitation that such application affords fair warning to the defendant. *Lauzetta v. New Jersey* (1939), 306 U.S. 451, 59

Sup. Ct. 618, 83 L.Ed. 888; *see also Younger v. Harris* (1971), 401 U.S. 37, 51, 91 Sup. Ct. 746, 27 L.Ed. 2d 699. *Douglas v. Buder* (1973), 000 U.S. 000, 93 Sup. Ct. 2199, 37 L.Ed. 2d 52.

The *Bouie Case* relied on by Chobot states substantially the same rule.

> "...when ...[an] *unforeseeable* state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of *fair warning* that his contemplated conduct constitutes a crime. *Bouie v. California, supra,* at 354, 355.

The question thus is whether the foregoing construction was so unforeseeable as to proclude its retoractive application to punish conduct occurring prior to the rendition of this construction.

Some trial courts in decisions rendered subsequent to *Miller* have discussed the retroactivity issue without deciding it. *See Hamar Theatres, Inc. v. Cryan,* Civil Action No. 472-773 (D. N.J. July 26, 1973); *Literature, Inc. v. Quinn* (No. 73-1074 (1st Cir., July 26, 1973); *Papp v. State,* No. 70-1077, 71-917 (August 6, 1973) (Dist. Ct. of Appeals, Fla. 4th Dist.): *United States v. Lang,* No. 10712-HP-CD (C.D. Cal. July 18, 1973). *See also Rhodes v. Florida* Case No. 41-416.

However, in our view, *Miller* has not made such drastic changes in the law of obscenity that the now *Roth-Memoirs-Miller* test needs to be specifically brought to the attention of all persons before it can be said that the ntoice comports with due process. The changes and modifications wrought by *Miller* are not so substantial in view

of this court's prior interpretations of the statute that due process requires that a defendant be given notice of the latest modifications. Now are the changes so serious as to mislead one intent on obeying the law. Chobot has not yet been tried so we do not know what the evidence may show, but the definition of obscenity in *Miller* covers less ground than the previous interpretation of the statute by this court and in that respect Chobot cannot be hurt and should be tried under the interpretation of sec. 944.21 (1) (a), Stats., herein declared.

While the state argues that Chobot's conduct might permissibly be judged according to the *Roth-Memoirs* test since it occurred prior to the *Miller* opinion, we concluded this is contrary to the mandates. The mandates in *Miller, Paris Adult Theater, Twelve-200-Foot Reels*, and companion cases, leave no doubt that the *Miller* test rather than the *Roth-Memoirs* test should be applied in the further proceedings; *a fortiori* the *Roth-Memoirs-Miller* test should be applied to other pending cases.

By the Court. – The petition for a writ of prohibition is denied.

HALLOWS, C.J. (*dissenting, in part*) I would reach the question of the scope of the independent review by this court and also state what this court has held community standards to mean. It is not a question of reaching community standards. *Miller* has not changed our prior decisions on this question. When this court heard this case in its initial stage as a motion, it decided to change the proceeding to one for an original action. I thought it was intended that the opinion would answer all the questions raised by *Miller* so that this case and other pending cases could be tried with some degree of certainty if we held the statute constitutional.

There is no question that the scope of the independent review must include all th elements of obscenity. This court cannot make a review of part of a constitutional concept and have different tests for another part of the concept. Due process under *Miller* requires that this court exercise its independent judgment in reviewing a determination that material is obscene in the constitutional sense and this review must encompass all three elements which make up the concept of obscenity.[1] In an independent review, this court is not bound by such appellate rules as "credible evidence to sustain the verdict," "the great weight and clear preponderance" or any other limiting rule.[2] These are now only factors which may be considered in exercising the court's independent judgment. The United States Supreme Court in it s obscenity decisions on independent review has not been bound by ordinary appellate review rules.

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[1] The quoted directive from *Miller* at p. 2615 must be considered in the light of the court's later statement that the application of community standards to arrive at a determination of what appeals to the prurient interest or is patently offensive constitutes a factual determination. Considering the authority cited by *Miller* and in light of *Kois v. Wisconsin*, each element of the obscenity test calls for the determination of a "question of constitutional fact," which must be independently reviewed by the appellate court. *See Miller* at 2615, citing *Kois v. Wisconsin*, 408 U.S. at 232; *Memoirs v. Massachusetts, supra*, 383 U.S. at 232 (Harlan, J., dissenting); *also Watts v. Indiana* (1949), 383 U.S. 49, 51, 69 Sup. Ct. 1347, 93 L. Ed. 1801, wherein it is stated: "... 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this court's adjudication."

[2] *See Court v. State* (1971), 51 Wis. 2d 683, 188 N.W. 2d 475.

I see no problem on contemporary community standards. This court never did accept the concept of national community standards.[3] State v. Kois (1971), 51 Wis. 2d 668, 188 N.W. 2d 467; *McCauley v. Tropic of Cancer* (1963), 20 Wis. 2d 134, 121 N.W. 2d 545. Therefore, *Miller* has not changed the Wisconsin law as it existed prior to that decision. Nor do I read *Miller* as requiring local standards. The Wisconsin law was a statewide standard, not local.

Community standards must be statewide. If we adopt local standards, are they to be on a city basis, county basis, circuit court basis, or some other basis? Should something be determined not obscene in Milwaukee and yet be obscene in Pepin county; Is there to be a separate standard for metropolitan areas different from rural areas? Are the federal courts in Wisconsin to follow the community standards of the state courts or is there to be one standard in the Eastern District and another in the Western District because the injuries are drawn from different districts? If the jury is waived, what then is the area of the local standard? If a national standard is unworkable, as *Miller* says it is, I find a local standard much more unworkable than national standards.

In *Tropic of Cancer* and in *Kois* this court committed itself to statewide community standards. This court applied a

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[3] This requirement that juries apply some mythical national standard first originated in the opinion of Justices Brennan and Goldberg in *Jacobellis v. Ohio* (1964), 378 U.S. 184, 84 Sup. Ct. 1676, 12 L. Ed. 2d 793. They argued that application of a local community standard would have the "intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." *Jacobellis v. Ohio, supra,* 193, quoting from *Manual Enterprises v. Day* (1962), 370 U.S. 478, 488, 82 Sup. Ct. 1432, 8 L. Ed. 2d 639 (opinion of Harlan, J.).

statewide standard on the reasoning, subsequently accepted by the United States Supreme Court in *Miller*, that anything else would be unworkable. Since sec. 269.565 (6), Stats.,[4] permitted a judgment of obscenity to be used collaterally in a criminal trial in some cases, the standard could not be less than statewide. If Wisconsin does not have a statewide standard, this statute is emasculated. The majority members, by not reaching this question and so stating, leave the impression that perhaps local standards are justified. This approach not only furnishes no guidance but invites appeals.

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[4] "269.565 Declaratory judgments against obscene matter. . .

(6) Admissibility in criminal prosecutions. In any trial for a violation of s. 944.21 or 944.22, the proceeding under this section and the final judgment of the circuit court under sub. (3) or (5) or the interlocutory adjudication under sub. (lm), shall be admissible in evidence on the issue of the obscenity of said matter and on the issue of the defendant's knowledge that said matter is obscene; provided, that if the judgment of the court sought to be introduced in evidence is one holding the matter to be obscene, it shall not be admitted unless the defendant in said criminal action was served with notice of the action under this section, or appeared in it, or is later served with notice of the judgment of the court hereunder, and the criminal prosecution is based upon conduct by said defendant occurring more than 18 hours after such service or such appearance, whichever is earlier."

No. St. 179

August Term, 1973

STATE OF WISCONSON: IN SUPREME COURT

State of Wisconsin ex rel. JOSEPH CHOBOT,
Petitioner,
v.

CIRCUIT COURT FOR MILWAUKEE COUNTY,

THE HONORABLE HERBERT J. STEFFES,
CIRCUIT JUDGE, Presiding,
Respondent.

WILKIE, J. (*Concurring*): I would reach the question of the scope of the independent review by this appellate court and join in the separate opinion of Mr. Chief Justice Hallows as to the scope of that review. Agreeing with the majority I would not at this point reach the question of the geographical area of the community standards.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

CARL R. CARTER
ACADEMY FILMS CORPORATION
DONALD A. DAVIS
DONALD A. DAVIS PRODUCTIONS, INC',
DONALD KLEIN and
HARLAN DAGEL

CRIMINAL CR 72-207

MEMORANDUM DECISION

In this indictment, the defendants are charged with the transportation of obscene movies in interstate commerce by means of a common carrier in violation of 18 U.S.C. § 1462 and with transportation of obscene movies in interstate commerce for the purpose of distribution in violation of 18 U.S.C. § 1465 and with conspiracy to violate the aforesaid statutes in violation of 18 U.S.C. § 371. There are in the indictment eighty-seven substantive counts and one conspiracy count which alleges ninety-six overt acts. The transportation of movies alleged is transportation from Memphis to Chicago, Memphis to Portland, Oregon, and Memphis to Indianapolis, and Chicago to Memphis, and Clarksville, Tennessee to Oak Grove, Kentucky. There are over thirty movies involved.

This Court has heretofore heard and overruled certain pre-trial motions but has taken under advisement the motion to dismiss upon the grounds herein dealt with.

Defendants have moved to dismiss the indictment on these grounds. First, that the decisions of the Supreme Court of June, 1973 may not be "applied retroactively" to the conduct which is the basis of this indictment because such conduct occurred prior to those decisions. Second, that since the Supreme Court held in those decisions that there is no national standard and that since only a national standard could be applied under these federal interstate transportation statutes, there is no available standard that could be applied in a trial charging violation of these statutes; or alternatively, that if a local standard could be applied, it would not be the standard of this locality and that therefore a jury here could not apply the applicable standard.

This Court has considerable doubt as to the validity of these contentions,[1] and since there are approximately ten other cases in this jurisdiction in which the same issues are raised, we are of the opinion that it would be well to have these issues resolved prior to the trial of these cases. Accordingly, this Court has decided to grant defendants' motion to dismiss in this case alone on both of these grounds so that the Government may appeal and obtain a resolution of these issues.

The Clerk will enter a judgment dismissing this indictment.

ENTER this 12th day of December, 1973.

/s/ CHIEF JUDGE

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[1] At the present time, it appears that there are decisions both ways as to each contention.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
JACKSON SEPTEMBER, 1973

RALPH MITCHUM,
Plaintiff-in-Error

v.

STATE OF TENNESSEE,
Defendant-in-Error

No. 10
Shelby County
Hon. John P. Colton, Judge
(Violation T.C.A. § 39-3003,
selling obscene matter, on
remand from U.S. Supreme Court)

For the Plaintiff-in-Error:

Walter Lee Bailey, Jr.
Memphis, Tennessee

Robert Eugene Smith
Baltimore, Maryland

Gilbert H. Deitch
Atlanta, Georgia

For the Defendant-in-Error:

David M. Pack
Attorney General

C. Hayes Cooney
Assistant Attorney General

Opinion
Filed: November 20, 1973

AFFIRMED

WILLIAM S RUSSELL,
Judge

OPINION

This case is before us a second time, having been remanded to this Court by the United States Supreme Court. The plaintiff-in-error, Ralph Mitchum, was charged and convicted of knowingly possessing, displaying, exhibiting and selling a certain obscene magazine in violation of the proscriptions of Tennessee Code Annotated § 39-3003, and his punishment set at one day in jail and a fine of five thousand dollars ($5,000.00). On his appeal in the nature of a writ of error to this court, we affirmed the conviction by an unpublished opinion filed on September 29, 1971. Certiorari was denied by the Tennessee Supreme Court, without opinion, on February 7, 1972; but was granted by the United States Supreme Court on June 25, 1973. Subsequently and contemporaneously with the restatement of the Constitutional Law on the subject of obscenity and the like disposition of some sixty-eight such cases, the United States Supreme Court

vacated our judgment and remanded the case to this court "for further consideration in light of Miller v. California, _____U.S._____(1973); Paris Adult Theatre I v. Slaton, _____U.S._____(1973; Kaplan v. California, _____U.S._____, (1973); U.S. v. 12,200 ft. Reels of Super 8mm Film, _____U.S. (1973); U.S. v. Orito, _____U.S. _____ (1973); Heller v. N.Y., _____U.S._____; (1973); Roaden v. Ky., _____U.S. _____ (1973); and Alexander v. Virginia, _____U.S._____(1973)." It was further said: "The cause is remanded to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, ***". The compliance with the mandate, we ordered the cause again docketed for oral argument, which has been heard; and briefed in the light of its present posture and the new United States Supreme Court decisions.

It is our view that the only rational purpose for the remand to this Court was for us to look to our statutes dealing with obscenity to determine what construction they have been given and/or shall have. If our statutes were facially overbroad or otherwise unconstitutional, it seems to us that a remand would have been unnecessary. We believe that if our obscenity statutes as construed conform to the new rules that they are valid. It seems obvious that the only purpose for the remand in this case was for the appropriate State court to pronounce an authoritative construction of these statutes. If that construction passes the new constitutionality tests set out in *Miller v. California*, _____U.S._____, 37 L.Ed. 2d 419, 93 S.Ct., _____, then this conviction may again be affirmed. Obviously other jurisdictions have been faced with this post-*Miller* question. While the Indiana Supreme Court has held in *Stroud v. State*, 13, Cr.L.2541, that its pre-Miller obscenity statute is unconstitutional because it doesn't

describe what acts shall be considered obscene, other jurisdictions have taken a view more in harmony with this Court. See *People v. Enskat,* (California), 13 Cr. L.2522; *State v. J-R Distributors, Inc.* (Washington), 14 Cr.L.2006; *U.S. v. One Reel of Film,* (U.S. First Circuit), 13 Cr.L.2482; and *U.S. v. Thevis*(U.S. Fifth Circuit) 14 Cr.L.2026. It is necessary, therefore, that we look to our statutes, their history and their meaning.

T.C.A.§ 39-3001 dated back to the Code of 1848, and sought to proscribe the printing, publishing, importing, selling or distributing of obscene material. However, this statute was declared unconstitutional by the Tennessee Supreme Court on November 12, 1964, in the case of *Ellenburg v. State,* 215 Tenn. 153, 384 S.W.2d 29, for want of an express requirement of scienter. A new statute was therefore mandated, and the Legislature promptly acted during its 1965 session to not only repeal the invalid statute, but also to pass the statutes that we are now construing. The first of these was T.C.A. § 39-3003, which says, in pertinent part:

> "* * * It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material.* * *"

The second statute passed at that time and which we need to look to for guidance on the question of Legislative intent as to what was sought to be proscribed is T.C.A. § 39-3006, and it says in pertinent part:

"* * *In any action or prosecution under * * * any laws of this state wherein the question of the obscenity of any material is an issue, it shall be admissible in evidence, among other things, to show:

(a) the character of the audience for which the material was designed or to which it was directed.

(b) what the predominant appeal of the material would be for ordinary persons; and what effect, if any, it probably would have on the conduct of such persons;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(f) the good repute of the author, creator, publisher or other person from whom the material originated, which evidence of good repute may be rebutted by the prosecution.* * *"

Finally, our Legislature in T.C.A.§ 39-3007 set about to define obscene material, in these words:

"Obscene material: Any material, matter, object or thing, including but not limited to, any written or printed matter, film, picture, drawing, or any object or thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if in addition, (a) it is patently offensive to the public or if it goes substantially beyond customary limits of candor in describing or representing such matters, and (b) it is devoid of any literary, scientific or artistic value and is utterly without social importance. The phrase 'predominant appeal' shall be considered with reference to ordinary persons."

It is more than coincidence that the language of these statutes parrots language of the United States Supreme Court, written by the Justices in a multiplicity of cases as they struggled to define constitutionally controlable obscenity. See, for example, *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct.1304 (1957). Our Legislature obviously desired and intended to control traffic in obscenity to the fullest extent possible without running afoul of First Amendment and other Constitutional guarantees. The language used was chosen hopefully to accomplish that purpose. The root of the present problem is that in recent years before the *Miller v. California* decision we have not had a majority of the U.S. Supreme Court to agree upon words to define obscenity. See, for examples, *Memoirs v. Massachusetts*, 383 U.S.413, 16 L.Ed.2d. 1, 86 S.Ct. 975 (1966), and *Redrup v. New York*, 386 U.S. 767, 18 L.Ed. 2d 515, 87 S.Ct.1414 (1967). Our statutory definition of obscenity (T.C.A.§ 39-3007), although passed in 1965, is remarkably similar in language to the three-pronged test enunciated by the plurality in *Memoirs*, supra, the following year. It is apparent that our Legislature made a conscious effort to define obscenity in words that would pass United States Supreme Court examination for constitutionality. Further definitive guidance has been completely lacking until *Miller*, Etc.

Now, we have for the first time in many years a United States Supreme Court majority definition of obscenity, a statement of what it is that may be lawfully controlled. The permissible scope of such regulation is to works which depict or describe sexual conduct, and that sexual conduct must be specifically defined by the applicable state law (as written or authoritatively construed). *Miller* says that: "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value".

Miller gives the basic guidelines for the trier of fact as (must be): "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to prurient interest, * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value".

Obviously, our statutes as written do not contain specific definitions of the sexual conduct the depiction or description of which may be constitutionally controlled. The United States Supreme Court suggests that two examples of what a state statute could define for regulation are: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

We are of the opinion that it is the depiction or description of sexual conduct that our statutes were clearly designed to apply to, and that the two specific examples given by the Court in *Miller* of what a state could define for regulation are simply the obvious examples of obscenity that immediately come to mind. In fact, the examples seem to cover the subject rather completely. We hold that implicit in the statutory definition of obscenity set out in T.C.A.§ 39-3007 is that it applies only to the depiction or description of sexual conduct; and that included in the statutory definition the trier of fact may find to be obscene (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and (b) patently offensive representations or descriptions of masturbation excretory functions, and lewd exhibition of the genitals.

The specificity required by the second branch of the Miller test, i.e. "sexual conduct specifically defined by the applicable state law", may be provided by judicial construction under the express language of *Miller.* Because this requirement has not previously been expounded, the prior decisions of the Tennessee Supreme Court and of this court have not addressed the specificity question directly. In 1967 our Supreme Court decided the case of *Rivieria Arts Theatre v. State,* 219 Tenn.652, 412 S.W.2d 890, involving the motion picture, "London Night Life". A finding by the trial judge that the film was obscene was affirmed, but our Supreme Court did not have the film before it and precisely what was depicted therein does not appear. The title would certainly indicate that it dealt with sexual conduct, and it obviously otherwise fell within the ambit of our statute. In the case of *Robert Arthur Management Corporation v. State,* 220 Tenn.101, 414 S.W.2d 638 (1967), our Supreme Court viewed the motion pictures "Mondo Freudo" and an advertising trailer "Olga's Girls" and pronounced them to be obscene. The Court, as has been customary in dealing with this subject, spared the readers of its opinion the graphic details of what was therein depicted, but instead used this language:

> "[16, 17] We have reviewed the evidence and have seen the film. We agreed with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of

> such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific or artistic value and utterly without social importance."

Obviously, in that case our Supreme Court specifically applied the statutes to films, dealing with sexual conduct, and thereunder dealth with "sexual filth", not otherwise specified, so to that extent we have a prior judicial construction of the ambit of the statutes. In the later case of *Art Theatre Guild, Inc. v. State ex rel. Rhodes,* 225 Tenn.399, 469 S.W.2d 669, our Supreme Court, after viewing the film, affirmed the judgment of the trial court in holding that the movie, "Without a Stitch", was obscene. Our Supreme Court did not elaborate upon what was depicted, but quoted the trial court's finding of fact, as follows:

> "That the film 'Without a Stitch' as a whole predominantly appeals to the prurient interest of the ordinary person; that it is patently offensive to the public; goes substantially beyond the customary limits of candor; and is devoid of any literary, scientific, educational, or artistic value; and further is without any social importance or value. This Court further finds as a matter of fact that the film 'Without a Stitch' is obscene under the standards set forth by Tennessee Code Annotated 39-3005."

Obviously, this was a film dealing with sexual conduct. That we were spared the details of the obscenity does not mean that our Supreme Court's holding did not furnish a specific precedent of construction as to the ambit of the statutes.

This court has dealt previously with obscenity cases. See *Larry Grigsby and Jackie Lynn Jones v. State;* filed at Knoxville on September _____, 1973, wherein we affirmed convictions for selling obscene magazines. Even in that case,

decided after *Miller*, we failed to specify the nature of the publications, which were sexually oriented depictions and descriptions of patently offensive ultimate sexual acts, normal and perverted, actual and simulated; and patently offensive representations and descriptions of masturbation and lewd exhibition of the genitals. We simply affirmed the established fact that they were obscene; but the record was available to any member of the public with a curiosity to learn the exact nature of the obscene material.

We adopt the two specific examples of what may be defined for regulation offered by the United States Supreme Court under the second part of the new *Miller* test as being implicit in our statutes, and are now made explicit by this Court. We construe our statutes to incorporate all of the tests of *Miller*. And so construed, they are in all respects constitutional. What *Miller* and its companion cases permit to be regulated as obscene is exactly what our Legislature was striving to control, and what we hold that it did accomplish. While our statute now seems to require more than the constitution, i.e. that the matter be "utterly without social importance"; and the Legislature may desire to amend this phrase now that it is clearly unnecessary to constitutionality; nevertheless, we do not believe that matters of sexual conduct, found to be obscene under the *Miller* tests, actually have any social importance. A careful review of the authorities will show, as was pointed out by Mr. Chief Justice Burger in *Miller*, that "utterly without redeeming social value" was simply what the Court in *Roth* presumed obscenity to be. The language in our Tennessee Supreme Court case of *Robert Arthur Management Corporation v. State*, supra, in which T.C.A. § 39-3007 was construed to mean that a work could not be obscene if it had "a modicum of social value", cites *Memoirs* as the basis for that ruling. The *Memoirs* test, in that particular, is no longer federal Constitutional law, being specifically rejected in *Miller*. We doubt that our Supreme

Court would now require the strict construction then mandated by the plurality of the U.S. Supreme Court. The language of our statute had its roots in *Roth*, not *Memoirs;* and "utterly without redeeming social value" was simply what the Court in *Roth* presumed obscenity to be, and was not a test for it. The whole question becomes somewhat circular when reflected upon, because obscenity as our statutes proscribe it can well be said to be utterly without redeeming social value. When our Tennessee Supreme Court made its construction aforesaid, it was, of course, under the holding of the U.S. Supreme Court in *Memoirs*, and that holding is no longer viable.

Addressing the three specific assignments of error upon this rehearing, we hold (1) that T.C.A.§§ 39-3003 and 39-3007 are not void for vagueness, as now construed; and (2) and (3) that our construction of these statutes is not limited to a prospective application only, and is not ex post facto legislation, but is the law of this case. It is clear to us that the United States Supreme Court implicitly held contrary to plaintiff-in-error's contentions as to all three assignments when it remanded this case to us, rather than dismissing it. The only function that could now be performed in this Court in this case that could not be done there in the U.S. Supreme Court is the initial construction of Tennessee statutes.

Ralph Mitchum is clearly guilty. The magazine that he sold depicted and described sexual conduct, and it included inter alia patently offensive exhibitions of the genitals. It represents "hard-core pornography" that could only be lawfully sold in the total absence of a proscribing statute, or if the First Amendment permitted no such control of obscene matter.

We again affirm the conviction.

/s/ William S. Russell, Judge

CONCUR:

/s/ John A. Mitchell, Judge

/s/ Charles H. O'Brien, Judge

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael G. THEVIS and Peachtree News
Company, Inc., Defendants
Appellants.
No. 71-2614.

United States Court of Appeals,
Fifth Circuit.
Sept. 12, 1973.

Defendants were convicted before the United States District Court for the Middle District of Florida, Fisher, J., 329 F. Supp. 265, of 12 counts of transporting obscene material by common carrier in interstate commerce and they appealed. The Court of Appeals, Bell, Circuit Judge, held that materials in question need not have been distributed to nonconsenting adults, juveniles or generally in a pandering manner to be found obscene, that Government was not required to prove that defendants were aware that materials were legally obscene, that expert testimony concerning prurient appeal, community standards and redeeming social

value was not necessary where materials themselves were available for inspection by finder of fact, and that six of 12 magazines were not utterly without redeeming social value and were not obscene.

Affirmed in part; reversed in part.

1. Obscenity 7

Materials in question need not have been distributed to nonconsenting adults, to juveniles or generally in a "pandering" manner in order to be found obscene. 18 U.S.C.A. § 1462.

2. Indictment and Information 110(19)

Indictment which tracked wording of statute proscribing transportation of obscene material by common carrier in interstate commerce was not insufficient on theory that if failed to specify elements of obscenity. 18 U.S.C.A. § 1462.

3. Obscenity 15, 17

In prosecution for transportation of obscene material by common carrier in interstate commerce, Government met its burden of proving scienter by proving that defendants knew nature of the materials which they had put in interstate commerce; Government was not required to prove that defendants had been aware that the materials were legally obscene. 18 U.S.C.A. § 1462.

4. Criminal Law 13.1(13)

Statute proscribing transportation of obscene material by common carrier in interstate material by common carrier in interstate commerce was not overbroad and invalid on theory that it failed to distinguish between transportation of obscene materials for private use and transportation for commercial distribution. 18 U.S.C.A. § 1462.

5. Obscenity 17

Expert testimony concerning prurient appeal, community standards and redeeming social value was not necessary in prosecution for transportation of obscene materials by common carrier in interstate commerce where materials themselves were available for inspection by finder of fact. 18 U.S.C.A. § 1462.

6. Courts 100(1)
Criminal Law 1187

"Memoirs" obscenity standard which was applicable prior to United States Supreme Court decision concerning concrete guidelines to isolate materials depicting or describing patently offensive hard core sexual conduct from expression protected by the First Amendment could be applied after the decision to determine obscenity of materials involved in transactions occurring prior to the decision and, in determining whether materials in question were obscene, Court of Appeals would consider both prior and subsequent definitions of obscenity and any count based on a magazine not obscene under both standards would be dismissed. 18 U.S.C.A. § 1462; U.S.C.A.Const. art. 1, § 9; Amend. 1.

7. Criminal Law 13.1(13)

Statute proscribing transportation of obscene material by common carrier in interstate commerce satisfied requirement that it specifically define sexual conduct whose depiction or description is restricted under United States Supreme Court decision even though statute, on its face, did not contain the requisite specifies, as obscenity definition had been added to statute by judicial gloss. 18 U.S.C.A. § 1462; U.S.C.A.Const. Amend. 1.

8. Obscenity 5

Inclusion of literary matter in significant proportions in magazines precluded finding that magazines were "utterly

without redeeming social value" and, therefore, magazines were not obscene even though pictures contained in them would have been found obscene standing alone. 18 U.S.C.A. § 1462; U.S.C.A. Const. Amend. 1.

Robert E. Smith, Atlanta, Ga., Norman J. Abood, Jacksonville, Fla., for defendants-appellants.

John L. Briggs, U.S. Atty., Jacksonville, Fla., Richard C. Owens, Atty., U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Before JOHN R. BROWN, Chief Judge, and BELL and SIMPSON, Circuit Judges.

BELL Circuit Judge:

Appellants Thevis and Peachtree News Company, Inc. were charged in a twelve-count indictment with transporting obscene material by common carrier in interstate commerce, in violation of 18 U.S.C.A. § 1462.[1] Jury trial was waived. The subject matter of each count was a particular magazine

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[1] 18 U.S.C.A. § 1462 (1966):
Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce –

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense. . . .

and appellants were convicted on each of the counts. The district court, 329 F.Supp. 265, found that the material in question, i.e., each magazine, was obscene under the three-pronged test of *Memoirs*.[2] A term of six months imprisonment and five years probation was imposed on Thevis under each count, with the sentences to be served concurrently. In addition, fines were imposed on each defendant with respect to each count. This appeal followed. We affirm with respect to six counts and reverse as to six.

In urging reversal, appellants originally presented five arguments to this court. These were: (1) that the constitutional test for obscenity must focus on whether "pandering" is involved in the distribution of challenged material, and on whether the material is distributed to minors or unwilling adults, cf. Redrup v. New York, 1967, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515; (2) that the indictment was unconstitutionally vague in that it merely tracked the statutory language without specifying the elements constituting "obscenity"; (3) that it was necessary for the government to prove that the appellants had transported the magazines knowing that they were obscene in the constitutional sense; (4) that 18 U.S.C.A. § 1462 is void for overbreadth in that it reaches transportation of obscene material for private as well as commercial use; and (5) that the prosecution failed to prove by competent evidence that the magazine fell outside the protection of the *Memoirs* standard. We understand appellants' fifth assignment of error to include two distinguishable elements: first, that the prosecution failed to produce sufficient expert testimony; and second, that the evidence, of whatever nature, was insufficient

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[2] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

to support the lower court's finding on the issue of obscenity vel non. We will treat these two elements as separate assignments of error.

Subsequent to oral argument, the Supreme Court announced five opinions in which a majority of that Court agreed on concrete guidelines to isolate materials depicting or describing "patently offensive 'hard core' sexual conduct" from expression protected by the First Amendment. Miller v. California, 1973, _____ U.S. _____, _____ 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, 432; Paris Adult Theatre I v. Slaton, 1973, _____ U.S. _____ 93 S.Ct. 2628, 37 L.Ed.2d 446; United States v. Orito, 1973, _____ U.S. _____ 93 S.Ct. 2680, 37 L.Ed.2d 492; United States v. 12 200-Ft. Reels of Super 8 mm Film, 1973, _____ U.S. _____ 93 S.Ct. 2665, 37 L.Ed.2d 500.

In light of these opinions, appellant has filed a supplemental brief urging that the *Memoirs* standard can no longer be used for testing obscenity. Further, in this brief it is argued that the *Miller* standard is also inapplicable, for two reasons: (1) that application of the new standard would be violative of the Ex Post Facto clause of Article I, § 9, United States Constitution; and (2) that in any case the material in question would be protected under *Miller* because 18 U.S.C.A. § 1462, as written or authoritatively construed, does not specifically define that sexual conduct whose depiction or description is thereby regulated. In essence, appellants are contending, on the authority of *Miller*, that the Supreme Court has eliminated all obscenity laws that would have been otherwise applicable to transactions occurring prior to June 21, 1973, and that the Court has also eliminated all laws controlling obscenity after that date, save as legislatures enact or courts construe statutes to meet the *Miller* requirements. In sum, claim the appellants, we are without power to test the materials for obscenity under any standard. We reject this

broad contention. We do not perceive that the Supreme Court, either deliberately or unwittingly, has stripped the nation of laws against obscenity in any such manner.

For reasons to be discussed in Part II of this opinion, we hold that the twelve magazines are to be tested for obscenity under both standards, with the appellants in every instance to receive the benefit of the most favorable standard. We sreserve the issue of obscenity *vel non*, under both standards, for Part III. In Part I we shall consider appellants' first five original assignments of error.

I.

[1] Appellants' first assignment of error in that the materials in question should not be tested under a standard as restrictive of pornography[3] as *Memoirs*. Rather they urge a standard arguably suggested in Redrup v. New York, supra, requiring for a finding of obscenity that the materials be distributed to nonconsenting adults, to juveniles, or generally in a "pandering" manner. We consider this argument to have been completely foreclosed by the Supreme Court's statement, in *Miller*, that the *Memoirs* standard was correctly viewed as the limit on state prosecution prior to *Miller*, ____ U.S. at ____ 93 S.Ct. at 2618, 37 L.Ed.2d at 435. We also find entirely spurious the argument that there was such a

[3] "Pornography" derives from the Greek (*porne*, harlot, and *graphos*, writing). It now means "1: a description of prostitutes or prostitution. 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of crotic behavior designed to cause sexual excitement." Webster's New International Dictionary (Unabridged, 3d Ed., 1969). Whether or not the material in question is obscene, it is pornography. This latter term connotes no legal conclusions or consequences.

marked departure in *Redrup* from the basic assumption of *Memoirs*, that the nature of the material and not the manner of its distribution is determinative of obscenity. In the *Redrup* per curiam opinion, the Court specifically declined to consider the effect of the characteristics of the method of distributing pornographic materials. Finally, we note that the origin of the "pandering" concept is Ginzburg v. United States, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, and that pandering in that case was specifically treated merely as an indicator of whether the material itself appealed to prurient interests and was utterly without redeeming social value. See *Ginzburg*, 383 U.S. at 467 – 476, 86 S.Ct. 942.

[2] Appellants' second argument is that the indictment, which tracked the wording of 18 U.S.C.A. § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:

> "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."

United States v. Farabee, 5 Cir., 1969, 411 F.2d 1210, 1211; Downing v. United States, 5 Cir., 1965, 348 F.2d 594, 599. See also Esperti v. United States, 5 Cir., 1969, 406 F.2d 148; Bland v. United States, 5 Cir., 1962, 299 F.2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth*[4] and *Memoirs*. Further,

[4] Roth v. United States, 1957, 354 U.S. 476, 77 S.Ct.1304, 1 L.Ed.2d 1498.

in *Roth* the Court held that the words used in 18 U.S.C.A. § 1462 are sufficiently precise to avoid the due process vice of vagueness.[5]

[3] Appellants' third contention deals with the scienter necessary for conviction under 18 U.S.C.A. § 1462. Appellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

Appellants base this argument on Smith v. California, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. In *Smith*, the Supreme Court reversed the conviction of a book store proprietor under an ordinance that imposed absolute criminal liability on any party possessing obscene matter for sale. The Court held that scienter, of some nature, was a necessary element where First Amendment Rights were concerned. However, the Court pointedly did not pass on the nature of the requisite mental element. Apparently the Court did not disturb its holding in Rosen v. United States, 1896, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: United States v. West Coast News Company, 6 Cir., 1966, 357 F.2d 855, rev'd on other grounds, Aday v. United States, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309; Schindler v. United States, 9 Cir.,

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[5] The sufficiency of an indictment tracking the words of 18 U.S.C.A. § 1462 was challenged in United States v. Luros, N.D. Iowa, 1965, 243 F.Supp. 160, rev'd on other grounds, 8 Cir., 1968, 389 F.2d 200. That court reached a conclusion identical to ours. *Id.* at 166-167.

1953, 208 F.2d 289. See also Kahm v. United States, 5 Cir., 1962, 300 F.2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

[4] The appellants' fourth contention is that the statute under which they have been prosecuted is overbroad because it fails to distinguish between transportation of obscene materials for private use and that for commercial distribution. This argument arises from Stanley v. Georgia, 1969, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, which established that individuals may possess obscene materials in the privacy of their own homes; and it assumes that there is a correlative right to transport and receive such material for private use. Whatever validity, if any, this reasoning may ever have had was badly eroded by United States v. Thirty-Seven Photographs, 1971, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, and United States v. Reidel, 1971, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813. The argument has now been absolutely foreclosed by United States v. Orito, supra. In *Orito* the Court ruled against a defendant who made precisely the same claim raised here.

[5] The first element of appellants' fifth contention is that their conviction is precluded by the government's failure to use sufficient expert testimony on the issues of prurient appeal, community standards, and redeeming social value. We held in United States v. Groner, 1973, 479 F.2d 577 (En banc), that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct in this opinion was made clear in Paris Adult Theatre I v. Slaton, supra, _____ U.S. at _____ 9 S.Ct. at 2634, 37 L.Ed.2d at 456. See also Kaplan v. California, supra, _____ U.S. at _____, 93 S.Ct. at 2684, 37 L.Ed.2d at 498.

II.

We now turn to the issues raised in appellants' supplemental brief, dealing with whether *Miller* precludes testing for obscenity under any standard.

In *Miller* the Court states that the constitutional test for obscenity is whether:

> "(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interst," (citations omitted)
>
> (b) whether the work depcits or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Orito,* supra, and *12 200-Ft. Reels,* supra, the Court made clear that this standard also applies to prosecutions under federal statutes. It might be noted that *Miller* relaxes the government's burden by climinating the *Memoirs* requirement that the material be proven "utterly without redeeming social value", and by the Court's clarification that "community standards" does not refer to a nationwide community. On the other hand, in order carefully to limit regulation of pornographic materials, so as to avoid First Amendment incursions, the *Miller* standard requires that regulatory statutes define specific sexual conduct to whose depiction or description they apply. However, the Court makes clear that the statutory requirement can be satisfied by a judicial gloss, and that statutes as broad as 18 U.S.C.A. § 1462 are subject to such construction. See *12 200 Ft. Reels,* supra, fn. 7 (discussed and quoted at p. 13 infra).

Having thus stated the standards governing control of pornography, and having also resolved other points of uncertainty,[6] the Supreme Court in each case, and in some 60 other cases dealt with summarily or by per curiam decision on July 25, 1973, vacated the judgments and remanded for further proceedings not inconsistent with the *Miller* series of opinions.

Appellants would have us conclude that the Court's wholesale vacation and remand of obscenity cases, and especially that of Kaplan v. California, supra (in which the Court agreed that the material was obscene under the *Memoirs* standard), established that the *Memoirs* standard could not have been used as a basis for conviction in pending cases.

[6] We decline to read so much into *Miller.* Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be reexamined in light of its clarification of previous standards and its declaration of new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." ___ U.S. at ___, 93 S.Ct. at 2618, 37 L.Ed.2d at 435.

Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of

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[6] Some of the auxiliary rulings were noted above when this court dealt with various of the appellants' original arguments for reversal. See Part I of this opinion.

Memoirs permitting unconstitutional infringement on efforts to distribute pornography. Rather, the Court was dissatisfied with *Memoirs,* because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. Thus the Court criticized the "utterly without redeeming social value" requirement as being a "burden virtually impossible to discharge under our criminal standards of proof." *Miller,* ___ U.S. at ___ 93 S.Ct. at 2613, 37 L.Ed.2d at 429, and it stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". *Id.,* at ___ 93 S.Ct. at 2619, 37 L.Ed.2d at 435. We are unable to conclude from the Court's wholesale remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under earlier extant standards if they are more restrictive of pornography than those in *Miller.* Thus when we make, as we are required to do, an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; United States v. Groner, 5 Cir. 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

Our dual test approach is out of an abundance of caution based on the surmise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the

benefit, if any, of the new standards. That our decision in this case must so accommodate the new standard is made evident by Miller v. United States, 1973, ___ U.S. ___ ,93 S.Ct. 3030, 37 L.Ed.2d 1022. There the Court vacated and remanded a federal conviction for reconsideration in light of the *Miller* series of opinions. The federal conviction was under the *Memoirs* standard and the very statute here involved, and against a defendant who raised on appeal contentions similar to those made by the appellants here. See Miller v. United States, 9 Cir. 1970, 431 F.2d 655.

[7] Therefore, before we consider the question of obscenity *vel non*, and because we do not apply the *Miller* standard, we must address ourselves to the question whether 18 U.S.C.A. § 1462 can satisfy the *Miller* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted. This assumes, of course, that the Supreme Court intended for appellants to have the benefit of the *Miller* standard.[7]

The statute under which the appellants were indicted proscribes interstate transportation of "obscene, lewd, lascivious, or filthy" materials. On its face, this statutory terminology does not contain the specifics required by *Miller*. The same, of course, might have been said of the statute while *Memoirs* controlled the definition of obscenity. The difference is that *Miller* requires that elements of the definition be a part of the statute. This requirement may be met, however, according to *Miller*, by authoritative judicial construction. Further, in *12-200 Ft. Reels*, supra, at fn. 7, the Court states that it is "prepared to construe such [federal statutory] terms as limiting regulated material to patently

[7] We do not assume, given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants.

offensive representations or descriptions of that specific "hard-core" sexual conduct given as examples in *Miller* . . ."[8] We believe that this answers the question and that the definition of *Miller* is a gloss properly added to § 1462. The effect is to substitute the *Miller* definition of "obscene" for the *Memoirs* definition. On this basis we proceed to an examination of the materials which underlie the indictment.

III.

In making our independent constitutional judgment under Jacobellis v. Ohio, supra, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. Our conclusions on each element of both tests as to each magazine are contained in Table I.

[8] In summary, we have concluded that all of the magazines are obscene under *Miller*, but that six are protected by the *Memoirs* requirement that they be utterly without redeeming social value. We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbianism, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter.

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[8] These examples are:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals."

Miller, ___ U.S. at ___, 93 S.Ct. at 2615, 37 L.Ed.2d at 431.

TABLE I

	Memoirs			*Miller*		
	(a)	*(b)*	*(c)*	*(a)*	*(b)*	*(c)*
Magazine Titles	*Dominant theme, taken as a whole, appeals to a prurient interest in sex*	*Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters*	*Utterly without redeeming social value*	*The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest*	*Patently offensive depiction or description of sexual conduct specifically defined by applicable statute*	*Taken as a whole, lacks serious literary, artistic, political or scientific value*
Boys and Their Male Lovers	Yes	Yes	No	Yes	Yes	Yes
Duo	Yes	Yes	Yes	Yes	Yes	Yes
Domino	Yes	Yes	Yes	Yes	Yes	Yes
Love Knot	Yes	Yes	Yes	Yes	Yes	Yes
Wanton	Yes	Yes	Yes	Yes	Yes	Yes
My Boys	Yes	Yes	Yes	Yes	Yes	Yes
In & Its Nice	Yes	Yes	Yes	Yes	Yes	Yes
Girlfriends	Yes	Yes	No	Yes	Yes	Yes
Pussy Willow	Yes	Yes	No	Yes	Yes	Yes
Arcadia	Yes	Yes	No	Yes	Yes	Yes
Teenage Jaybirds	Yes	Yes	No	Yes	Yes	Yes
Cloud 9	Yes	Yes	No	Yes	Yes	Yes

Indeed, the pictures in each instance are the principle content of the magazines and would, standing alone, be found obscene.

Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed.

Affirmed in part; reversed in part.

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert E. COTE, Defendant
Appellant.

No. 72-2417

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 11, 1973.

Rehearing Denied Nov. 9, 1973.

Defendant was convicted in the United States District Court for the Northern District of Texas, Leo Brewster, Chief Judge, of mailing obscene films, magazines and circulars in violation of statute, and he appealed. The Court of Appeals, Fifth Circuit, 470 F.2d 755, affirmed, and certiorari was granted. The Supreme Court, ___ U.S. ___, 93 S.Ct. 3061, 37 L.Ed.2d 1037, remanded the cause for further consideration in light of its recent decisions in the area of obscenity. Upon remand, the Court of Appeals held that magazines, movie film, and advertising materials upon which the prosecution of defendant was predicated were obscene as a matter of law and therefore not constitutionally protected.

Affirmed.

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* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y., 31 F.2d 409, Part I (5th Cir. 1970).

Obscenity

Magazines, movie film and advertising materials upon which the prosecution of defendant was predicated were obscene as a matter of law and therefore not constitutionally protected.

George Grove, Jr., Beverly Hills, Cal., for defendant-appellant.

Frank McCown, U.S. Atty., Alex H. McGlinchey, Asst. U.S. Atty., Fort Worth, Tex., for plaintiff-appellee.

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

Pursuant to the order of the Supreme Court of the United States dated June 25, 1973 vacating our judgment and remanding this cause to this court, we have made an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", Jacobellis v. Ohio, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). Furthermore, we have tested the materials under both the standard for obscenity set out in A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), and the standard recently enunciated in Miller v. California, ___ U.S. ___, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *See* United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973). The statute involved, 18 U.S.C. § 1461, has been the subject of authoritative judicial construction which renders its application constitutionally proper.

The materials for which Cote was prosecuted were magazines entitled, "Ups and Downs No. 4", "Duplex" and

"Gemini"; a reel of movie film entitled: "Tri-sex"; and advertising materials thereabout.[1] We have tested each and all of these materials in the manner set out in *Thevis, supra.* If the test results of each of these articles were put into tabular form as was done in *Thevis,* every answer to every question would be yes.[2]

Therefore, the convictions of Robert E. Cote upon his pleas of guilty are again

Affirmed.[3]

---

[1] The following excerpt from Defendant's brief in this court describes the materials involved:

That the picture books, films and advertisements charged in the indictment in the case at bar depict nude females in sexually suggestive poses and body movements is not in dispute. That there are occasionally a man and woman or two women in a picture (but without explicit sexual activity) is conceded. That the pictures and films are vulgar and monotonous is beyond argument. That no serious social message is communicated or intended by the pictures and films is evident. That no great dramatic talent or graphic artistry is demonstrated in the pictures and films is readily determinable upon a casual viewing. Tawdry? Very probably. Dull? Certainly. Sexually provocative? Perhaps to some: undoubtedly pathetic or laughable to others.

[2] Defendant contends that only hard-core pornography, which he defines as portrayal of explicit sexual acts in which the genitals are exposed, may be punished as criminally obscene. He urges that we follow the "actual performance" of the Supreme Court "as distinguished from its *rhetoric.*" With the announcement of *Miller* and the companion cases of the same date, the Court's "performance" has taken a significant new turn. See *Thevis, supra.*

[3] Cote received concurrent two-year sentences upon each count.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1161

PARIS ADULT THEATRE I,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, As Solicitor General of the Criminal Court of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE II,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, As Solicitor General of the Criminal Court of Fulton County, Georgia,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PART I

Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, and Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, Respondents, pray that the Application for Writ of Certiorari to the Supreme Court

of Georgia to review the judgment entered in this case on October 30, 1973, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 231 Ga. 312; 201 S.E. 2d 456 (1973). It is also set out as "Exhibit B" in Petitioner's Petition for Writ of Certiorari, Appendix, Volume I.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether the Georgia obscenity statute (Ga. Code Ann. 26-2101) was properly construed by the Georgia Supreme Court upon remand.

2. Whether the Georgia Supreme Court properly applied the Georgia Obscenity Statute to petitioner's conduct upon remand.

3. Whether the two (2) motion picture films which are the subject matter of these proceedings, and determined by the Supreme Court of Georgia to be obscene, are obscene in the Constitutional sense and are therefore not protected expression under the First Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the constitutional and statutory provisions set forth in Appendix "C" of the Petition for Certiorari, Appendix, Volume I.

STATEMENT OF THE FACTS

On December 28, 1970, Lewis R. Slaton as District Attorney of the Atlanta Judicial Circuit and Hinson McAuliffe as Solicitor General of the Criminal Court of Fulton County filed separate complaints in the Superior Court of Fulton County against Paris Adult Theatre I and II and named individuals praying for a rule nisi to require the defendants to show cause on a day certain why the motion picture films "It All Comes Out In The End" and "Magic Mirror" should not be declared obscene and subject to be seized and seeking in each case an order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same.

A temporary injunction was granted ex parte by the local trial court restraining the defendants from destroying the films or removing them from the jurisdiction of the Court. The rule nisi was duly issued and served in each case and an adversary hearing was held pursuant thereto on January 13, 1971, before a Judge of the Superior Court of Fulton County. The parties agreed to waive a jury trial and a preliminary hearing and stipulated that the judgment and order entered by the trial judge would be the Final Judgment and Order in each case.

The two (2) films were exhibited to the trial court. The only other state evidence was testimony by the criminal investigators that they had paid admission to see the films and that nothing on the outside of the theatre indicated the full nature of what was shown. In particular nothing indicated that the films depicted—as they did—

scenes of simulated fellatio, cunnilingus and group sex intercourse.

After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment.

> " 'The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, 'It All Comes Out In The End,' and 'Magic Mirror.' Assuming that obscenity is established by a find that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occuring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.
>
> "It appears to the court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.
>
> "It is the judgment of this court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.
>
> "The actions against the defendants, therefore, are dismissed.

"This 12th day of April, 1971

Jack Etheridge, Judge,
Superior Court of Fulton
County,
Atlanta Judicial Circuit."

On appeal from this order, the Georgia Supreme Court unanimously reversed the judgment of the trial court holding that the said films are hard-core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the First Amendment. *Slaton v. Paris Adult Theatre,* 228 Ga. 343, 185 S.E. 2d 768 (1971).

This court granted Certiorari on June 26, 1972, and thereafter on June 21, 1973, vacated the judgment of the Georgia Supreme Court and remanded the case for further proceedings not inconsistent with the opinion rendered in Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); and U.S. v. 12,200 Ft. Reels of Super 8 mm film etal, 413 U.S. 123 (1973). This court denied a petition for rehearing in this case on October 9, 1973.

Pursuant to this court's remand, on October 30, 1973, the Georgia Supreme Court construed Georgia Code Ann. 26-2101 in light of prior Georgia cases and *Miller v. California;* thereby, affirming the earlier decision of Slaton v. Paris Adult Theatre I, 228 Ga. 343, 185 S.E. 2d 768 (1971).

The Supreme Court of Georgia held that in the past it had defined and described conduct as obscene within the meaning of the Georgia statute in substantially the same language as suggested by this court in *Miller v.*

California and that these definitions were part of the statute before the acts of petitioner which formed the basis of the injunction.

The Supreme Court of Georgia also held that the "utterly without social redeeming value test" existing in the Georgia statute placed a greater burden to the state than the new standard of *Miller* and the pre-*Miller* social value test was to be applied to the petitioner. In addition the court construed the Georgia statute to include the new test "serious literary, artistic, political or scientific value, but the state still had to prove both the Memoirs v. Massachusetts, 383 U.S. 413 (1966) test and the new *Miller* test.

And, finally the court held that State standards were the standards of the State of Georgia and that the films were obscene under that standard.

A petition for certiorari to the Supreme Court of Georgia was filed with this court on January 28, 1974.

PART TWO

CONSTRUCTION OF STATE OBSCENITY STATUTES BY THE VARIOUS STATE COURTS IN LIGHT OF THE NEW STANDARDS SET FORTH IN MILLER V. CALIFORNIA AND ITS COMPANION CASES HAS BEEN UNIFORM AND CORRECT.

1. WHETHER THE GEORGIA OBSCENITY STATUTE (GA. CODE ANN. 26-2101) WAS PROPERLY CONSTRUED BY THE GEORGIA SUPREME COURT UPON REMAND.

The Georgia obscenity statute reads as follows:

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents of the subject matter; if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially

beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000 or both. (Acts 1968, pp. 1249, 1302; 1971, p. 344.)

The Georgia obscenity law is a criminal statute, however, it is used as the test for obscenity in civil cases. *See* Walter v. Slaton, 227 Ga. 676, 182 SE 2d 464 (1971); 1024 Peachtree Corp. v. Slaton, 228 Ga. 102, 184 SE 2d 144 (1971).

It is settled law that courts may interpret statutory language so as to preserve the validity of the statute Redlich v. Capri Cinema, Inc., 349 N.Y.S. 2d 697 (1973). A court has a duty to uphold a statute if it can—Chobot v. Circuit Court for Milwaukee City, 212 NW 2d 690 (1973); Gibbs v. State 504 SW 2d 719 (1973). Support for the proposition that a state court may now construe a statute to comport with the *Miller* formulation may be found in *Miller* itself.

"We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing statutes as construed heretofore or hereafter, may well be adequate. Miller v. Calif., 413 U.S. 49, _____

Consequently, *Miller* did not reverse the lower court but vacated and remanded for further proceedings. This mandate appears in all the *Miller* companion cases. Significantly at the end of each opinion, where the remand court is directed to conduct further proceedings not inconsistent with the First Amendment standards established by *Miller*, this Court cites United States v. 12-200 Ft. Reels, 413 U.S. 123 N7 which says:

"We further note that, while we must leave to state courts the construction of State legislation, we do have a duty to authoritatively construe federal statutes . . . if and when such a serious doubt is raised as the vagueness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent' or 'immoral' as used to describe regulated material in 19 U.S.C. 1305 (a) and 18 U.S.C. 1462 . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California . . . Of course Congress could always define other specific 'hard core' conduct.

Also, this Court recognized that the Georgia Supreme Court could construe the Georgia statute to comport with the *Miller* test in the instant case.

In the opinion rendered by this Court in the instant case it was said "in light of these holdings, nothing precludes the State of Georgia from regulation of the allegedly ob-

scene materials . . . provided that the applicable Georgia laws as written or authoritatively interpreted by the Georgia courts meets the first amendment standards set forth in *Miller* v. *California*. Paris Adult Theatre v. Slaton, 413 US. 49 _____

Therefore on remand from this court the Supreme Court of Georgia construed the Georgia obscenity statute in light of *Miller v. California* and its companion cases. In doing so it followed a majority of the state courts which have passed upon the question. State v. Vixen, 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973); Rhodes v. Florida, 283 So. 2d 351 (1973); Redlich v. Capri Cinema, Inc., 349 N.Y.S. 2d 697 (1973); Gibbs v. State, 504 S.W. 2d 719 (1974); Chobot v. Circuit Ct. for Milwaukee Cty., 212 N.W. 2d 690 (1973); State v. Bryant, 201 S.E. 2d 211 (1973); People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973); Price v. Commonwealth, 201 SE 2d 798 (1974). *See* Richards v. Texas, 497 S.W. 2d 770 (1973). *But See* Papp v. Florida, 281 So. 2d 600 (1973); State v. Wedelstedt, 213 N.W. 2d 652 (1973); Mahney v. Indiana, 300 N.E. 2d 66 (1973); Stroud v. Indiana, 300 NE 2d 100 (1973); Louisiana v. Shreveport News Agency Inc., 287 So. 2d 464 (1974).

However, virtually all courts have agreed that *Miller v. California* and its companion cases did not repeal all state statutes dealing with obscenity. *See* in addition to the citations heretofore, Ebert v. Maryland Board of Censors, 313 A. 2d 536 (1973); United Artists Corp. v. Harris, 363 F. Supp. 857 (W.D. Oka. 1973); U.S. v. Thevis, 484 F. 2d 1149 (5th Cir. 1973); U.S. v. Millican, 487 F. 2d 331 (5th Cir. 1973). *But See* U.S. v. Lang, 361 F. Supp. 380 (C.D. Calif. 1973). Hamar Theatres Inc. v. Cryon, 365 F. Supp. 1312 (D.N.J. 1973).

Miller v. California specially held that it did not require a state to enact new obscenity laws but that existing state statutes "as construed heretofore or hereafter may well be adequate.

Therefore the Georgia Supreme Court was correct in construing the Georgia obscenity statute in light of prior constructions, and the words of the statute itself.

The Georgia Supreme Court had authoritatively construed the statute to define specific proscribed sexual conduct. In Gornto v. State, 227 Ga. 46, 178 SE 2d 894 (1970), the Georgia Supreme Court held that the statute proscribed closeups of unclothed genitalia, acts of homosexuality, sadism and masochism, masturbation, sodomy, beastiality, and sexual intercourse. In Evans Theatre v. Slaton, 227 Ga. 377, 180 SE 2d 712 (1971), the court held the statute encompassed "numerous acts of sexual intercourse, natural, unnatural, bizarre and violent. Likewise in Walter v. Slaton, 227 Ga. 676, 182 SE 2d 464 (1971) the court held that actual sexual activity both natural and unnatural of the most salacious character come within the statute. See 1024 Peachtree Corp. v. Slaton, 228 Ga. 102, 184 SE 2d 144 (1971). These decisions are interpretations of the phrase "shameful or morbid interest in nudity, sex or excretion" found in the Georgia statute. Indeed under a fair reading of these cases they announce a rule limiting the relevant Georgia Code sections along lines almost identical to the suggested examples of prohibited conduct in the *Miller* opinion.

> "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . Patently offensive representations or

> descriptions of masturbation, excretory functions and lewd exhibition of the genitals." Miller v. California, 413 U.S. 15, _____ (1973).

The patently offensive test is expressly present in the statute.

> ". . . if in addition it goes substantially beyond customary limits of candor in describing or representing such matters, Ga. Code Ann. 26-2101 (b)"

Other state courts have held that prior constructions limited these statutes to specifically defined sexual conduct.

In People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), the California Court of Appeals held that their obscenity statute has been limited to specific sexual conduct by prior decisions. The California penal code involved (Cal. Penal Code 311.2) is almost identical to the Georgia statute.[1] The court said:

> "Previous California cases have so limited section 311. Thus, it is clear that section 311 prohibits only "hard core pornography" (Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152) that nudity does not equate with obscenity and that "no matter how ugly or repulsive the presenta-

---

[1] Section 311.2 provides in relevant part, "Obscene matter means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e. a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance. . . ."

tion, we are not to hold nudity, absent a sexual activity, to be obscene" (People v. Noroff, 67 Cal. 2d 791 at 797, 63 Cal. Rptr. 575 at 579, 433 P.2d 479 at 483), and that "To constitute obscenity . . . the material must contain a graphic description of sexual activity" (People v. Cimber, 271 Cal. App. 2d Sup. 867, 869, 76 Cal. Rptr. 382, 383). Further, and with respect to material of similar character to that involved here, Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 stated with reference to a film depicting, among other things, fellatio, sodomy and oral copulation that "It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships. . . . (245 C.A. 2d at 826, 54 Cal. Rptr. at 181). The film was held to be obscene with the meaning of section 311. Miller thus has not imposed any new requirements upon California law insofar as two of the three elements required by section 311 are involved. People v. Enskat 33 Cal. App. 3d 900, 109 Cal. Rptr. 433, 439 (1973).

In Price v. Commonwealth, 201 SE 2d 798 (1974), the Virginia Supreme Court on remand from this Court (413 U.S. 912 1973) held that the Virginia statute[2] had been previously construed to define the sexual conduct prohibited. The court said:

"We have narrowed this definition by judicial construction, In House v. Commonwealth, 210 Va. 121, 127, 169 S.E. 2d 572, 577 (1969), we reversed an

[2] Vig. Code 318.1-227.

obscenity conviction involving a magazine which featured pictures of nude and partially clothed men and women. There we held that a portrayal of nudity is not, as a matter of law, a sufficient basis for a finding that a work is obscene. See also Upton v. Commonwealth, 211 Va. 445, 447, 177 S.E. 2d 528, 530 (197). Thus, the Virginia obscenity law under which Price was convicted limits the class of works which might be found obscene to portrayals of sexual activity or excretion, not including mere nudity, which go beyond the customary limits of candor in representing such matters.

(2) We conclude that the Virginia obscenity statute, as construed, prohibits only hard core pornography such as the examples delineated in Miller and does not restrict constitutionally protected speech and writing. We do not believe that the Miller examples were intended to preempt or standardize state obscenity statutes, for the Supreme Court emphasized that it was not the court's function to propose regulatory schemes for the states. 413 U.S. at 25, 93 S.Ct. 2607. Consequently, we hold that our obscenity law is not valid for overbreadth. Price v. Commonwealth, 201 SE 2d 798, 800 (1974)."

In State v. Vixen, 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973), an action to abate a film as a nusiance, the Supreme Court of Ohio on remand from this court held that the Ohio obscenity statutes, construed together, defined the prohibited conduct.

In Rhodes v. Florida, So. 283 2d 351 (1974) the Supreme Court of Florida held that these statutes had been construed to include the prohibited conduct. See

also State v. J - R Distributors Inc., 82 Wash. 2d 584, 512 P. 2d 1049 (1973); Redlich v. Capri Cinema Inc., 349 N.Y.S. 2d 69 (1973); Basilone v. Florida, 286 So. 2d 616 (1974) per curiam denial of certiorari, Mager J. concurring.

And some state courts, while recognizing a construction was possible have held that there respective statutes have not been construed to define prohibited acts or that statutes were too general to be construed to comport with *Miller*.

In Hamar Theatres Inc. v. Cryon, 365 F. Supp. 1312 (D.N.J. 1973), pornographers challenged the New Jersey anti-obscenity statute. The district court held the statute unconstitutional in light of *Miller*. The statute contained only the prurient interest test of *Roth* and nothing more. To construe the statute to comport with *Miller* the court would have to add two parts of the three prong definition specifically left out by the New Jersey legislature. *See* also Mahney v. Indiana, 300 N.E. 2d 66 (1973); Stroud v. Indiana, 300 N.E. 2d 100 (1973).

In Louisiana v. Shreveport News Agency, Inc., 287 So. 2d 464 (1974) the Louisiana Supreme Court held that the Louisiana obscenity statute could not be construed to comport with Miller. The statute used the terms "lewd, lascivious" to refer to obscene material and had recently been construed to comport to *Roth*. (Louisiana v. Gay Times, Inc., 274 So. 2d 162 (1973). Although recognizing that "the adoption of federal constitutional standards in the interpretation and enforcement of state statutes is an accepted judicial practice," the court felt the statute would require legislative, not judicial action to save it in that it was so general in its terms.

Similarly, in the case of State v. Wedelstedt, 213 N.W. 2d 652 (1972) the Iowa Supreme Court in a criminal case held that the Iowa obscenity statute which used the phrase "corruption of the morals of youth or others" and which had never been authoritatively construed was vague and overbroad in light of *Miller*.

The Georgia Supreme Court applied the *Memoirs* test to the material in this case and construed the statute to include both the *Memoirs* test and the *Miller* test so that now the state must show that the material

1. is utterly without social redeeming value; and,

2. the material lacks serious literary, artistic, political or scientific value. The court found the material involved here to be utterly without social redeeming value. Slaton v. Paris Adult Theatre, 228 Ga. 343, 185 SE 2d 768 (1971) which by necessity requires that the material lack serious literary, artistic, political or scientific value. Price v. Commonwealth, 201 SE 2d 798, 801 (1974) because part (c) of the *Miller* test is broader and less rigorous than the Memoirs test. See People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr 433 (1973). State v. Bryant, 201 SE 2d 211 (1973).

The Georgia Court could not read the Memoirs test out of the statute because to do so would invade the province of the legislature and thus violate separation of powers principles.

This court nowhere held that the "utterly without social redeeming value" test is itself unconstitutional. This court said:

> "we do not adopt as a constitutional standard the 'utterly without redeeming social value' test as Mem-

> oirs. . . ." We also reject, as a constitutional standard, the ambiguous concept of 'social importance'. . . ." Miller v. California, 413 U.S. 15, _____ N.7.

This court stated that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law" Miller v. California, 413 U.S. 15 _____ (1973). The Memoirs test was rejected, not because it permitted an unconstitutional infringement on efforts to distribute pornography, but rather because it imposed greater burden on the regulation of such materials than was demanded by the constitution. Miller v. California, 413 U.S. 15 (1973); U.S. v. Thevis, 484 F. 2d 1149, 1154 (5th Cir. 1973).

There is no reason why state law cannot impose more strict requirements on the prosecution as to the definitions of obscenity than the constitution would require. That, in effect is what the "utterly without redeeming social value" formulation does. In Paris Adult Theatre v. Slaton, 473 U.S. 49 (1973) this court said:

> "It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material . . ."

Paris Adult Theatre v. Slaton, 413 U.S. 49 _____ (1973). To add the *Miller* social value formulation to the Georgia statute simply adopts constitutional standards to the enforcement of state statutes—an accepted judicial practice State v. Eros Cinema Inc., 262 La. 706, 264 So. 2d 615 (1972); State v. Rasheed, 248 La. 309, 178 So. 2d 261, cert. den. 384 U.S. 1012 (1965). If petitioners proposition, that the Georgia court could not adopt the

Miller social value, were true; this court in the interest of strengthening powers to regulate pornography, would be eliminating constitutionally valid law that would otherwise be available in prosecuting obscenity cases. See State v. Bryant, 201 SE 2d 211 (1973).

II WHETHER THE GEORGIA SUPREME COURT PROPERLY APPLIED THE GEORGIA OBSCENITY STATUTE TO THE CONDUCT OF PETITIONER UPON REMAND.

The Supreme Court of Georgia construed the Georgia obscenity statute to include both the *Miller* and *Memoirs* social value formulation. The *Memoirs* test included greater protections to free speech and depression and was fully applicable to pre-*Miller* defendants. See U.S. v. Thevis 484 F 2d 1149 (5th Cir. 1973). U.S. v. 1 Reel of Film, 481 F. 2d 206 (1st Cir. 1973). This court's decision in *Miller* does not require reversal of state obscenity convictions under laws that define obscenity at least as narrowly as *Miller*. People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973). Petitioner got the benefit of *Memoirs* and *Miller*. This dual procedure protected petitioner from retroactive application of *Miller* standards which might ease the burden of the state. At the same time it granted petitioner the application of *Miller* standards which might place a heavier burden upon the State. State v. Bryant, 201 SE 2d 211 (1973). U.S. v. Millican, 487 F. 2d 331 (5th Cir. 1973).

There has been no judicial enlargement of a statute by the Georgia Supreme Court, much less a retroactive application. Nor has there been an unconstitutional narrowing of an overly broad statute to save retroactively its

application to a criminal defendant. Therefore, the cases of Rabe v. State, 405 U.S. 313 (1972) and Bouie v. Columbia, 378 U.S. 347 (1964) are not in point. This is a civil case where the statute has a judicial loss limiting its definitional provisions prior to petitioner's conduct. *Compare* Cox v. New Hampshire, 312 U.S. 569, 577 (1941) *with* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). *See* Chobot v. Circuit Court for Milwaukee City, 212 N.W. 2d 690 (1973).

There can be no serious question that the situation of the petitioners have not been substantially altered by the application of the standards of *Miller* already prevailing in Georgia under statutory and decisional law.

WHETHER THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE OBSCENE, ARE OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

The two films involved in the instant case have been before this Court before. Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973). "Magic Mirror" and "It All Comes Out In The End" depict sexual congress in every manner and method known to man and are clearly and easily distinguishable from material involved in cases such as Burgin v. South Carolina, 255 S.C. 237 178 SE 2d 325, *reversed* 404 U.S. 806 (1971) and other cases reversed by this court citing Redrup as authority: The films were found to have violated the *Roth* Memoirs test prevailing in Georgia at the time of trial. Slaton v. Paris Adult

Theatre, 228 Ga. 343, 185 SE 2d 768 (1971). Therefore, the films were shown to be utterly without social redeeming value and to have contained conduct as described in the prior Georgia cases such as Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 SE 2d 712 (1971) and 1024 Peachtree Corporation v. Slaton, 228 Ga. 102 184 SE 2d 144 (1971) (actual sexual activity, both natural, unnatural, bizarre and violent including sexual intercourse, fellatio and cunnilingus.)

If material is utterly without social redeeming value it must necessarily lack serious literary, artistic, political or scientific value. The films are obscene under both the *Roth-Memoirs* test and the new *Miller* test. *See* U.S. v. Thevis, 484 F. 2d 1149 (5th Cir. 1973).

CONCLUSION

For the foregoing reasons, the construction of state obscenity statutes by the various state courts in light of *Miller v. California* has been uniform and correct. The Georgia Supreme Court properly construed Georgia Code Ann. 26-2101 in light of *Miller v. California* and properly applied it to the petitioner herein. The films here involved are not protected by the First Amendment and are obscene under both the *Roth-Memoirs* and *Miller* formulations.

Respectfully submitted,

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